THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

346.4
Ex. North Gall.

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—Sir F. A. Bosanquet, K.C.
Vice-Chairman—Robert F. Norton, Esq., K.C.

EX-OFFICIO MEMBERS.

Right Hon. Sir Rufus D. Isaacs, K.C.V.O., M.P.	Attorney-General.
Sir J. A. Simon, K.C.V.O., M.P. . .	Solicitor-General.
W. J. Humfrys, Esq., President of the Law Society.	

ELECTED MEMBERS.

P. Ogden Lawrence, Esq., K.C. A. R. Kirby, Esq.	Lincoln's Inn.
Sir F. A. Bosanquet, K.C. H. F. Dickens, Esq., K.C.	Inner Temple.
J. M. Astbury, Esq., K.C. C. C. Scott, Esq., K.C.	Middle Temple.
J. C. Lewis Coward, Esq., K.C. H. E. Duke, Esq., K.C., M.P.	Gray's Inn.
W. English Harrison, Esq., K.C., of the Middle Temple. Robert F. Norton, Esq., K.C., of Lincoln's Inn.	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
W. Melmoth Walters, Esq. (Firm—Messrs. Walters & Co.). J. W. Budd, Esq. (Firm—Messrs. Budd, Johnson & Jecks).	The Law Society.

Secretary—P. Noble Fawcett, Esq., 10, Old Square, Lincoln's Inn, London, W.C.

1911.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Probate Division.

COURTS OF PROBATE, DIVORCE, AND ADMIRALTY.

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL;

ALSO DECISIONS IN THE

ECCLESIASTICAL COURTS.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*

ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law.*

REPORTERS.

Court of Appeal	W. COWELL DAVIES, H. B. HEMMING, G. A. STREETEN, T. L. MEARS,	*Barristers-at-Law.*
Probate and Divorce	H. D. GRAZEBROOK,	*Barrister-at-Law.*
Admiralty Cases	T. L. MEARS,	*Barrister-at-Law.*
Ecclesiastical Cases	C. F. JEMMETT,	*Barrister-at-Law.*

1911.

LONDON:

Printed for the Council of Law Reporting

BY BRADBURY, AGNEW, & CO. LD., OF 10, BOUVERIE STREET, E.C.,

And Published

BY THE COUNCIL AT 10, OLD SQUARE, LINCOLN'S INN, W.C.

BIBL. LONDIN UNIV.

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-family-division_1911

JUDGES

OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

1911.

Sir Samuel T. Evans, Knt., President.
Sir Henry Bargrave Deane, Knt.

JUDGES

OF

THE COURT OF APPEAL.

1911.

Earl Loreburn, Lord Chancellor.

Lord Alverstone, Lord Chief Justice of England.

Sir H. H. Cozens-Hardy, Master of the Rolls.

Sir Roland Vaughan Williams,	Ordinary Judges of Court of Appeal.
Sir J. Fletcher Moulton,	
Sir George Farwell,	
Sir H. B. Buckley,	
Sir W. R. Kennedy,	
Sir Samuel T. Evans, Knt.	President of the Probate, Divorce and Admiralty Division.

ERRATA.

Page	*Line*	*For*	*Read*
245	12 from bottom, margin	*The Shakkeborg*	*The Skakkeborg*
246	2 from top, margin	*The Shakkeborg*	*The Skakkeborg*
247	2 from top, margin	*The Shakkeborg*	*The Skakkeborg*

The Mode of Citation of the Volumes of the *Law Reports* commencing January 2, 1911, will be as follows :—

In the First Series,
[1911] 1 Ch. [1911] 2 Ch.

In the Second Series,
[1911] 1 K. B. [1911] 2 K. B. [1911] P.

In the Third Series,
[1911] A. C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

B.

		PAGE
Beaney, Curtis *v.*		181
Bien, The		40
Browning *v.* Browning		161

C.

Clarke *v.* Clarke	(C. A.)	186
Crippen, In the Estate of		108
Curtis *v.* Beaney		181

E.

Evans, Williams *v.*		175
Ezardian, The		92

H.

Hazelmere, The	(C. A.)	69
Hero, The	(C. A.)	128
Highland Loch, The	(C. A.)	261

J.

Jinks *v.* Jinks	120

K.

Kingsland, The	17

L.

Leslie *v.* Leslie	203

M.

Maréchal Suchet, The	1
Mudlark, The	116

P.

Portsmouth, The	(C. A.)	54
President Lincoln, The		248
Pretty *v.* Pretty		83
Price *v.* Price		201

Q.

Quartermaine *v.* Quartermaine	180

R.

Ragnhild, The	254
Ruck *v.* Ruck	90

S.

Sanders *v.* Sanders	(C. A.)	101
Shorter *v.* Shorter		184

	PAGE
Sirrell *v.* Sirrell	38
Skakkeborg, The	245, n.
Stevenson *v.* Stevenson	(C. A.) 191
Stokes *v.* Stokes	195

U.

Umsinga, The	234

V.

	PAGE
Von Brentano, In the Estate of	172

W.

West Cock, The	23
	(C. A.) 208
Williams *v.* Evans	175

TABLE OF CASES CITED.

A.

		PAGE
Abdy *v.* Abdy	12 Times L. R. 524	103
Andalusian, The	2 P. D. 231	267
Anselm, The	[1907] P. 151	149
Attorney-General for Trinidad and Tobago *v.* Erichè	[1893] A. C. 518	196

B.

Bailey, In the Goods of	2 Sw. & Tr. 156	110
Bamfield *v.* Goole and Sheffield Transport Company	[1910] 2 K. B. 94	227
Bellanoch, The	[1907] A. C. 269	149
Bernina, The	12 P. D. 58	145
Blakemore *v.* Glamorganshire Canal Company	2 C. M. & R. 139	113
Blenheim, The	4 No. Ca. 393	267
Boardman *v.* Boardman	L. R. 1 P. & M. 233	170
Boddy *v.* Boddy	30 L. J. (P. M. & A.) 23	193
Borham *v.* Borham	L. R. 2 P. & M. 193	193
Brass *v.* Maitland	6 E. & B. 470	220
Bremner *v.* Bremner	3 Sw. & Tr. 378	181
Brisco *v.* Brisco	2 Hagg. Con. 199	206
Brown *v.* Brown	L. R. 1 P. & M. 46	162
Brownswood *v.* Edwards	2 Ves. Sen. 246	113
Bywell Castle, The	4 P. D. 219	141

C.

Cachapool, The	7 P. D. 217	267
Caledonia, The	157 U. S. 124	35, 218
Cambrian, The	8 Asp. M. L. C. 263	10
Cambridge, The	Not reported	146
Campania, The	[1901] P. 289	95
Carib Prince, The	170 U. S. 655	36, 218
Castrique *v.* Imrie	L. R. 4 H. L. 414	113
Cayo Bonito, The	[1904] P. 310	10
Cayzer *v.* Carron Company	9 App. Cas. 873	144
Ceto, The	14 App. Cas. 670	73
Chamberlain, In the Goods of	L. R. 1 P. & M. 316	176
Cheale *v.* Cheale	1 Hagg. Eccl. 374	123
Chesnutt *v.* Chesnutt	1 Spinks, 196	166
Christian *v.* Christian	78 L. T. 86	103
Ciocci *v.* Ciocci	1 Spinks, 121	166
City of Lynn, The	11 Fed. Rep. 339	265

		PAGE
Cleaver *v.* Mutual Reserve Fund Life Association	[1892] 1 Q. B. 147	109
Clutha Boat 147, The	[1909] P. 36	151
Cockatrice, The	[1908] P. 182	255
Colchester Corporation *v.* Brooke	7 Q. B. 339	51
Collett *v.* Collett	1 Curt. 678	164
Collins *v.* Collins	9 App. Cas. 205	201
Constantinidi *v.* Constantinidi	[1904] P. 306	187
Cooper *v.* Cooper	3 Sw. & Tr. 392	123
Copsey *v.* Copsey	[1905] P. 94	201
Corinthian, The	[1909] P. 260	149

D.

David *v.* Frowd	1 My. & K. 200	177
Davies *v.* Mann	10 M. & W. 546	269
Dawes, In the Goods of	L. R. 2 P. & M. 147	185
Dent *v.* Dent	34 L. J. (P. & M.) 118	201
Diederichsen *v.* Farquharson	[1898] 1 Q. B. 150	61
Dimes *v.* Petley	15 Q. B. 276	271
Duc d'Aumale, The	[1904] P. 60	15
Dunelm, The	9 P. D. 164	255

E.

Earl of Auckland, The	Lush. 164, 387	242
East Yorkshire Steamship Company *v.* Hancock	5 Com. Cas. 266	57
Elderslie Steamship Company *v.* Borthwick	[1905] A. C. 93	34, 217
Etna, The	[1908] P. 269	151

F.

Fawcett, In the Goods of	14 P. 152	185
Finney *v.* Finney	L. R. 1 P. & M. 483	197
Fletcher *v.* Fletcher	64 J. P. 807	196
Frankfort, The	[1910] P. 50	148
Frankland, The	[1901] P. 161	151

G.

Gann *v.* Free Fishers of Whitstable	11 H. L. C. 192	51
General Steam Navigation Company *v.* British and Colonial Steam Navigation Company	L. R. 3 Ex. 330; L. R. 4 Ex. 238	242
George Roper, The	8 P. D. 119	267
Gibson *v.* McCarty	Cas. temp. Hardwicke, 311; 11 C. B. 124	113
——— *v.* Small	4 H. L. C. 353	226
Glengarry, The	2 P. D. 235	267
Glengyle, The	[1898] P. 97; [1898] A. C. 519	9
Goodden *v.* Goodden	[1892] P. 1	205
Grand Trunk Railway of Canada *v.* Barnett	[1911] A. C. 361	271
Grovehurst, The	[1910] P. 316	258

H.

		PAGE
H. M. S. Sans Pareil	[1900] P. 267	128
Hamilton *v.* Mackie	5 Times L. R. 677	54
Hankow, The	4 P. D. 197; 4 Asp. M. L. C. 97	234, 241
Harriman *v.* Harriman	[1909] P. 123, 148	193
Hathaway *v.* Barrow	1 Camp. 151	113
Heard *v.* Heard	[1896] P. 188	199
Helsham *v.* Blackwood	20 L. J. (C.P.) 187; 11 C. B. 111	113
Hillyard *v.* Grantham	cited 2 Ves. Sen. 246	113
Houghton *v.* Houghton	[1903] P. 150	201
Hudson *v.* Hudson	3 Sw. & Tr. 314	168
Hulthen *v.* Stewart & Co.	[1903] A. C. 389	22
Hyman *v.* Hyman	[1904] P. 403	181
——— *v.* Nye	6 Q. B. D. 685	33, 216

I.

Indus, The	12 P. D. 46	26

J.

Jaederen, The	[1892] P. 351	20
Jameson *v.* Leitch	Milw. Eccl. (Ir.) 683	113
Johnson *v.* Johnson	[1900] P. 19	197
Jones *v.* Jones	Searle & Smith's Rep. 135	168
——— *v.* White	B. N. P. 233; 1 Str. 68	113
Joseph *v.* Joseph	76 L. T. 236	103, 122
Justice *v.* Gosling	21 L. J. (C.P.) 94	113

K.

Kay *v.* Kay	[1904] P. 382	191
Keene *v.* Angel	6 T. R. 740	105
Kemp-Welch *v.* Kemp-Welch	[1910] P. 233	101, 122
Kettlewell *v.* Kettlewell	41 L. T. 737	192
Killarney, The	Lush. 427	242
King's County, The	20 Times L. R. 202	255
Kingston's (Duchess of) Case	2 Sm. L. C., 11th ed., p. 731	113
Knapp *v.* Knapp	6 P. D. 10	192
Kopitoff *v.* Wilson	1 Q. B. D. 377	220

L.

Laertes (The Cargo ex)	12 P. D. 187	37, 218
Lapington *v.* Lapington	14 P. D. 21	191
Leslie *v.* Leslie	[1908] P. 99	204
Leyman *v.* Latimer	3 Ex. D. 352	108
Liver Alkali Company *v.* Johnson	L. R. 9 Ex. 338	220
Lucey *v.* Ingram	6 M. & W. 302	243
Lyle Shipping Company *v.* Cardiff Corporation	[1900] 2 Q. B. 638	20

M.

		PAGE
Mac, The	7 P. D. 38, 126	116, 119
Maori Queen (Owners of Cargo) *v.* Hughes	[1895] 2 Q. B. 550	36, 218
Maréchal Suchet, The	[1911] P. 1	30, 214
Margaret, The	9 App. Cas. 873	144, 271
Maude, The	3 Asp. M. L. C. 338	10
Merchant Prince, The	[1892] P. 179	26
Midland Railway Company *v.* Martin & Co.	[1893] 2 Q. B. 172	196
Minnehaha, The	Lush. 335	14, 33, 216
Mohan *v.* Broughton	[1899] P. 211	176
Monte Rosa, The	[1893] P. 23	150
Moorcock, The	14 P. D. 64	220
Morphett *v.* Morphett	L. R. 1 P. & M. 702	161
Mourne, The	[1901] P. 68	149

N.

N. *v.* N.	2 Sw. & Tr. 234	168
Nairne *v.* Nairne	85 L. T. 649	122
——— *v.* ———	71 L. J. (P. & M.) 37	123
Nelson Line (Liverpool), Ld. *v.* James Nelson & Sons, Ld.	[1908] A. C. 16	34, 217
Nicholl *v.* Jones	2 H. & M. 588	182
Nicol *v.* Nicol	31 Ch. D. 524	123
Nugent *v.* Smith	1 C. P. D. 423	220

O.

Octavia Stella, The	6 Asp. M. L. C. 182	52
Ovingdean Grange, The	[1902] P. 208	151

P.

Paine *v.* Paine	[1903] P. 263	201
Patteson *v.* Hunter	30 L. J. (P. & M.) 272	173
Peters *v.* Tilly	11 P. D. 145	103
Petrie *v.* Rostrevor	[1898] 2 I. R. 556	271
Pickavance *v.* Pickavance	[1901] P. 60	196
Pickwick, The	16 Jur. 669	10
Popkin *v.* Popkin	1 Hagg. Ecc. 765	165
Postlethwaite *v.* Freeland	5 App. Cas. 599	20
Prichard *v.* Prichard	3 Sw. & Tr. 523	205
Prince of Wales, &c., Association Company *v.* Palmer	25 Beav. 605	115
Prinsep *v.* Dyce Sombre	10 Moo. P. C. 232	115

R.

Radley *v.* London and North Western Railway Company	1 App. Cas. 754	150, 269
Randall *v.* Newson	2 Q. B. D. 102	9
Ratata, The	[1897] P. 118; [1898] A. C. 513	13, 33, 216

		PAGE
Rathbone Brothers & Co. *v.* MacIver, Sons & Co.	[1903] 2 K. B. 378	35, 217
Readhead *v.* Midland Railway Company	L. R. 4 Q. B. 379	220
Reg. *v.* Gaunt	L. R. 2 Q. B. 466	196
—— *v.* Glynne	L. R. 7 Q. B. 16	197
—— *v.* Machen	14 Q. B. 74	198
—— *v.* Stanton	8 E. & B. 445	242
Restitution Steamship Company *v.* Pirie & Co.	7 Asp. M. L. C. 11, note	61
Robert Dixon, The	5 P. D. 54	13
Robertson *v.* Amazon Tug and Lighterage Company	7 Q. B. D. 598	9, 231
———— *v.* Robertson	6 P. D. 119	103
Rodenacker *v.* May & Hassell, Ld.	6 Com. Cas. 37	20
Rodoconachi *v.* Milburn	17 Q. B. D. 316	60
Runciman *v.* Smyth	20 Times L. R. 625	59
Russell *v.* Niemann	17 C. B. (N.S.) 163	57
——— *v.* Russell	[1892] P. 152	123

S.

St. Paul, The	[1908] P. 320; [1909] P. 43	237
Sanders *v.* Sanders	[1911] W. N. 46	122
Sawyer *v.* Birchmore	1 Keen, 391	177
Serraino *v.* Campbell	[1891] 1 Q. B. 283	57
Shamrock Steamship Company *v.* Storey & Co.	8 Asp. M. L. C. 590	61
Skakkeborg, The	[1911] P. 245, n.	237
Smith *v.* Rummens	1 Camp. 9	113
Stanton *v.* Richardson	L. R. 9 C. P. 390	220
Steel *v.* State Line Steamship Company	3 App. Cas. 72	9, 32, 216
Stettin, The	Br. & L. 199	242
Swanland, The	2 Spinks, E. & A. 107	26
Swift, The	[1901] P. 168	44

T.

Tactician, The	[1907] P. 244	236
Talabot, The	15 P. D. 194	95
Taylor *v.* Perrin	Unreported	57
Temperley Steam Shipping Company *v.* Smyth	[1905] 2 K. B. 791	58
Temple, Thomson & Clarke *v.* Runnalls	18 Times L. R. 822	20
Tirzah, The	4 P. D. 33	95
Tuff *v.* Warman	5 C. B. (N.S.) 573	145, 269
Tweedsdale, The	14 P. D. 164	259

U.

Undaunted, The	Lush. 90	10
————	11 P. D. 46	32, 216
United Service, The	8 P. D. 56	220
United States, The	12 L. T. 33	267
Uskmoor, The	[1902] P. 250	149

V.

		PAGE
Velasquez, The	L. R. 1 P. C 494	236
Vianna, The	Swa. 405	267

W.

Waikato (Owners of Cargo of S.S.) *v.* New Zealand Shipping Company	[1899] 1 Q. B. 56	34, 217
Walker *v.* Walker	76 L. T. 234	123
Walsham *v.* Stainton	2 H. & M. 1	182
Warwick *v.* Warwick	85 L. T. 173	122
Webb *v.* Webb	1 Hagg. Eccl. 349	193
Weir *v.* Richardson	3 Com. Cas. 20	17
Whalley *v.* Lancashire and Yorkshire Railway Company	13 Q. B. D. 131	265
Whittal *v.* Whittal	30 L. J. (P. & M.) 43	167
Wilkinson *v.* Gordon	2 Addams Eccl. 152	113
Wood *v.* Wood	13 P. D. 22	193

Y.

Yates *v.* Kyffin-Taylor	[1899] W. N. 141	108
Yeatman *v.* Yeatman	39 L. J. (P. & M.) 37	101

CASES

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

THE MARÉCHAL SUCHET.

1910

May 12, 13, 30; *June* 25; *July* 27.

Admiralty—Salvage—Claim by Tug engaged to tow—Obligations under Towage Contract—Burden of Proof—Counter-claim for Breach of Contract of Towage—Claim by other Tugs belonging to same Owners—Claim by the Master and Crew of the Tug engaged to tow, and by the Masters and Crews of the other Tugs belonging to the same Owners.

Tug owners contracted with the agents of the owners of a large French sailing ship to provide a tug to tow her from Falmouth to London. After passing the Prince's Channel lightship, a strong south-westerly wind was encountered, and tug and tow drifted to leeward, the tow taking the ground on the West Shingles Sand. There she remained for several days, during which time the tug engaged to tow, and three other tugs belonging to the same owners, besides other tugs, lifeboats, and a number of boatmen, came to her assistance, and on the fourth day the vessel came off.

In consolidated actions of salvage, the claims of the owners of the tug engaged to tow, and of the three other tugs belonging to them, and also those of the masters and crews of the respective tugs, were separately considered. Some were allowed and some were disallowed. Other claims for "engaged" services in the nature of salvage were also allowed,

1910

THE MARÉCHAL SUCHET.

although the services did not result in the ultimate salving of the vessel. As to the various claims:—

Held by the President (Sir Samuel Evans), that the claims of the owners, master, and crew of the tug towing under the contract must be rejected as her owners had failed to prove (the burden of proof being upon them) that they had supplied a tug efficient for the purpose, or that the change from towage to salvage became necessary by reason of special circumstances in the nature of vis major or inevitable accident, and not by reason of the inefficiency of the tug, or want of skill and care on the part of the master and crew.

Negligence not having been pleaded by the defendant owners of the tow, it was objected that the defendants could not rely on the want, if any, of skill and care on the part of those in charge of the tug; but:—

Held, that it is not necessary to plead negligence in order to defeat a salvage claim.

Held, further, that for any services rendered by the other three tugs belonging to the same owners, the owners were not entitled to salvage as they had failed in the performance of their contract to tow, but:—

Held, that this did not bar the claims of the masters and crews of the three last-mentioned tugs to an award for "engaged" services rendered in the salvage operations.

The defendants, the owners of the sailing ship, counterclaimed against the owners of the tug under the contract of towage for damages in respect of the stranding of the tow:—

Held, that special conditions in the contract of towage—although they could not enure to the benefit of the plaintiffs in the salvage claim—did in the circumstances afford a defence to the counter-claim for damages for breach of contract.

The obligations under a contract of towage stated; and observations on the necessity, in the public interest, of careful scrutiny of a claim for salvage by a tug which has been engaged to tow the vessel in respect of which the salvage claim is made.

CONSOLIDATED ACTIONS OF SALVAGE.

The plaintiffs were the owners, masters, and crews of the steam tugs *Guiana*, *Columbia*, *Vincia*, *Badia*, *Sun II.*, *Sun III.*, and *Champion*, the coxswain and crew of the volunteer lifeboat *Friend to All Nations*, and Arthur Polley and others, the coxswain and crew of the volunteer lifeboat *True to the Core*. The defendants were the owners of the sailing ship *Maréchal Suchet*, her cargo and freight.

The *Maréchal Suchet* is a steel three-masted full-rigged ship belonging to the port of Nantes, of 1991 tons register, and, at the material time, she was on a voyage from a port in Japan, via Falmouth, to London with a cargo of oak and some cedar logs.

1910

THE MARÉCHAL SUCHET.

She was drawing 19 ft. 6 in. forward and 19 ft. 9 in. aft, and was manned by a crew of twenty-five hands.

On February 16, 1910, the steam tug *Guiana*, of 166 tons gross register, 600 horse power effective, and of the value of 6000*l.*, took the *Maréchal Suchet* in tow under a contract made through agents of the respective owners for a towage from Falmouth to London for the sum of 80*l.* During the voyage up channel the wind was favourable, and off Dungeness a Trinity House pilot was taken on board. About 2 A.M. on the 18th the *Guiana* with the *Maréchal Suchet* in tow passed the Prince's Channel light vessel. The wind at the time was blowing strongly from the south-west and shortly afterwards increased in force, with the result that the *Guiana* was unable to make any headway, and the *Maréchal Suchet* getting out of control, both tug and tow were blown bodily to leeward. At 3.15 A.M. the *Guiana* signalled to the *Maréchal Suchet* to get her anchor ready, but at 6 A.M. the ship swung athwart, having touched the ground aft. The tug continued towing for some time, but failed to move the ship, and as the tide was beginning to fall, the hawser was slipped. The *Maréchal Suchet* was then lying, with her starboard anchor down, aground on the Shingles Sand heading about north-west, her position being as follows: The South-West Shingles buoy bearing south-west distant about two-thirds of a mile, Prince's Channel light vessel bearing south-east distant about three-quarters of a mile, and the South-East Girdler buoy bearing south-west distant about one and a half miles. The starboard anchor was hove up, the port anchor put out, and, at low water, soundings shewed about one fathom round the ship. The *Guiana* proceeded to Margate, telegraphed for more assistance, and shortly after her return to the ship, the tugs *Columbia*, *Sun II.*, and two other tugs arrived, and also the Margate surf lifeboat *Friend to All Nations*, which stood by the ship, the coxswain and another hand going on board, though told that their services were not required. The *Columbia*, a screw tug of 213 tons gross, with triple expansion engines (alleged to be) of 1100 horse power effective, and valued at 7000*l.*, had been lying at Blackwall when she received instructions to proceed to the assistance of a vessel ashore on the Shingles, and at 2.30 P.M.

1910

THE MARÉCHAL SUCHET.

reached the ship, which had two black balls hoisted on the fore-stay, the wind and sea at the time being moderate, and the neap tide just beginning to flow. The Trinity House pilot compulsorily in charge of the *Maréchal Suchet* told the *Columbia* she could take hold as soon as there was water enough alongside the ship. About 4 P.M. the *Guiana* and *Columbia* proceeded to the ship, together with the *Sun II.* (whose services had been accepted) and two other tugs. About 4.30 P.M. the *Guiana* and *Columbia* commenced towing in a southerly direction, and, as the ship did not move, about 5 P.M. the *Sun II.* passed her rope on board. These three tugs towed till about 7 P.M., when they cast off and anchored under the lee of the Sand; the south-westerly wind at the time was freshening and backing to the southward.

During the night the tug *Vincia* (of 147 tons gross register, engines of 99 horse power nominal, a crew of seven hands, and valued at 7500*l.*) and the *Badia* (of 147 tons gross register, engines of 59 horse power nominal, a crew of seven hands, and valued at 7500*l.*) arrived, with other tugs, and about 5 A.M. on the 19th the *Guiana* and the *Sun II.* made fast on the port bow, and the *Columbia* on the starboard bow. These three tugs towed for about an hour in a southerly direction, when the *Champion* (a screw tug of 116 tons gross register, engines of 98 horse power nominal, a crew of seven hands, and of the value of 7500*l.*) was engaged under the mistaken impression that she was the *Badia*, but on the discovery of the mistake her tow rope was cast off, and the *Badia* was hailed to make fast. The four tugs towed till 8 A.M., by which time the ship's head had been turned a little to the westward, and they then cast off, the *Sun II.* proceeding to Margate and bringing off two representatives of the owners and underwriters, but the weather was then too bad to put them on board the ship. The Margate surf lifeboat, however, took off a representative of the *Maréchal Suchet* and landed him at Margate, and her crew were paid 2*l.* for the service. About 7 P.M., the wind having in the meantime increased with some ground swell, the *Guiana* and *Badia* made fast on the port bow, and the *Columbia* on the port side. These three tugs, and the *Sun II.*, towed until 9.15 P.M., when they cast off. On February 20 the wind and sea had

1910

THE MARÉCHAL SUCHET.

decreased, and at 6.30 A.M. the *Guiana*, *Badia*, and *Sun II.* made fast on the port bow, and the *Columbia* on the port side. They towed for about two hours, when the *Vincia* was hailed from the ship to pass her line on board, and the *Sun III.*, whose services had been engaged, having also made fast, all six tugs towed in a southerly direction until 9.30 A.M. The wind had now increased to a moderate gale with considerable sea, and the *Guiana*, having gone to Margate for provisions, towed out the National lifeboat to the ship, but towed her back again on finding that the surf lifeboat *Friend to All Nations* had about 3.30 P.M. taken off the crew of the ship, who were landed at Margate by the tugs *Sun II.* and *Sun III.*, the crew of the *Friend to All Nations* being paid 5*l.* for their services. On the afternoon tide the weather was too bad for the tugs to go to the ship, and the *Columbia* anchored at some distance, and the *Vincia*, having been hailed by the *Sun II.* that the ship was breaking up, and that her mast was through the bottom, left with the *Badia*. On the 21st no towage was done, but about 5 P.M. the lifeboat *True to the Core* (with Arthur Polley, acting as coxswain, and a crew of thirteen), belonging to a company of twenty-five boatmen at Walton-on-Naze, reached the vessel, and, finding no one on board, the boatmen proceeded to jettison cargo, at first from the main and later in the night from the after hold. The next morning (the 22nd) they fetched from below a small kedge anchor and laid it from the port bow away to the south-west with 100 fathoms of $1\frac{1}{2}$ in. wire in order, as they alleged, to keep the ship in position, and prevent the wind and tide from setting her further up the sand. On the return of the master and crew of the *Maréchal Suchet*, who were brought back by the *Sun II.* and put on board the vessel by the surf lifeboat, the crew of the *True to the Core* were told to desist from the work upon which they were engaged. About 10 A.M., the weather having moderated, the *Guiana*, *Sun II.*, *Sun III.*, and the tug *Doria* (engaged on towage terms) made fast, and, after all four tugs had been towing for about half an hour, the ship floated, and (according to her statement of claim) the *Guiana* " resuming her towage contract," she and the *Sun II.* together towed the *Maréchal Suchet* up to Gravesend, arriving there about 7 P.M. Early the next morning (the 23rd)

1910

THE MARÉCHAL SUCHET.

the *Guiana*, the *Vincia*, and the *Sun III.* made fast, the *Sun II.* being in attendance, and at 1.30 P.M. the vessel was brought to the Surrey Commercial Docks and left in a position of safety.

It was alleged on behalf of the four tugs *Guiana*, *Columbia*, *Vincia*, and *Badia*, all belonging to the same owners, Watkins & Co., that they were instrumental in rescuing the *Maréchal Suchet*, her cargo and freight, from certain total loss; that she was aground on a dangerous sand in an exposed position, and at a period of the winter when heavy weather was to be expected and was prevailing; that the position of the ship was considered so hopeless by those in charge of her that she was abandoned by her crew and left derelict; that from the time the ship was blown on to the Shingles, on February 18, until she was floated on February 22 the services which were rendered by the *Guiana* were outside the scope of the towage agreement; that the services rendered by the *Columbia*, *Vincia*, and *Badia* were rendered at request, and greatly contributed to the eventual salving of the *Maréchal Suchet*.

The *Sun II.* and *Sun III.* are new steam tugs fitted with the necessary plant and gear for salvage work, and both are of 199 tons gross register, with engines of 150 horse power nominal, and each is of the value of 10,500*l.*

On behalf of these two tugs it was alleged that their services were rendered in very bad weather, and at great risk; that they were the means of rescuing the crew of the *Maréchal Suchet* and taking them ashore; that both tugs ran great risk of coming into collision with the other tugs and of striking the sand; that the *Sun II.* was damaged to the extent of 70*l.*, and lost her anchor and part of the chain.

The value of the Margate surf lifeboat *Friend to All Nations* was pleaded at 1000*l.*, and it was alleged on behalf of her coxswain and crew that they were engaged to stand by at a time when the boat and her crew were exposed to considerable risk; that the boat was of great use in taking off the crew on February 20 and bringing them back to the ship on the 22nd; and that some of her hands assisted the crew of the ship in making the tugs fast, and six of their number remained with the ship till she reached Gravesend.

1910

THE MARÉCHAL SUCHET.

The Walton-on-Naze lifeboat *True to the Core* is maintained by voluntary subscriptions. She was built in 1908, and in 1909 was fitted with a motor engine. It was urged on behalf of her coxswain and crew that, at the time they boarded her, the *Maréchal Suchet* was derelict, and, by lightening her, her position was shifted on the night of February 21, which assisted in enabling the tugs on the following day to get her clear of the sands; that by laying out the anchor they prevented the vessel being carried further up the sands; and that they protected the property of the defendants from pillage.

On behalf of the tug *Champion* it was alleged that on February 18 she was engaged by the pilot of the *Maréchal Suchet* to tow if further assistance was required, and that she therefore stood by that night, and on the morning tide of the 19th she was asked to make fast. Whilst doing so she was damaged by collision with another tug, but towed throughout the whole of that tide. On the evening tide, when in a position to make fast, she was again damaged by collision with another tug, and was then told that her services were not required, as the *Badia* had been engaged to tow. She claimed to have sustained damage to the amount of 85*l.* 12*s.* 10*d.*

The defendants, the owners of the *Maréchal Suchet*, admitted that salvage services were rendered by the steam tugs *Sun II.* and *Sun III.*, but alleged that the flotation of the vessel was mainly brought about by the making tides, and the flow of water consequent on the falling away of the south-west wind which had been holding the water up; that after the heavy weather of the night of the 19th, when her mainmast was found to have been bent and her deck buckled, there was considerable apprehension that she would be lost, but as she weathered the subsequent gale there was no real danger; that the towages prior to the morning of February 22 were of no value whatever, and if any risk of collision prevailed it was due to the number of tugs remaining near the *Maréchal Suchet* and refusing to move after their assistance had been declined; that the owners of the *Guiana* were not entitled to any award for the alleged salvage service, as the difficulty in which the *Maréchal Suchet* was placed was due to their breach of contract in failing to supply

1910

THE MARÉCHAL SUCHET.

a reasonably fit and proper tug, namely, one of sufficient power to tow the *Maréchal Suchet* in the weather that was experienced on the morning of February 18, which was less severe than might reasonably have been expected at that time of the year; that the services of the *Columbia*, *Vincia*, and *Badia* were valueless and conferred no benefit on the property of the defendants, but, if they were of benefit, the owners of those tugs, being also owners of the *Guiana*, were not entitled to any salvage award; that if the *Champion* was in collision, it was due to her anchoring when she knew the tugs engaged would have to manœuvre; that no services were rendered by her, as she only succeeded in making fast by representing that she was the *Badia*, and after a quarter of an hour her tow rope was cast off; that they tendered and paid into Court the sum of 50*l.* (in addition to the 2*l.* and 5*l.* already paid) as ample reward for any services rendered by the crew of the *Friend to All Nations*; and finally that no salvage services were rendered by the *True to the Core*.

By way of counter-claim against the owners of the steam tug *Guiana*, the defendants claimed judgment against those owners for the damages sustained by the *Maréchal Suchet*, and for any salvage and costs that the defendants might be ordered to pay.

By their defence to the counter-claim the plaintiffs the owners of the *Guiana* referred to the terms of the contract of towage dated February 14, 1910, between the tug owners and the ship's agent, by which it was provided, inter alia, that the owners of the tug should not be responsible for any damage occurring to . . . . vessels while in tow of the tug, and it was further provided that the owners of the tug should not be answerable or accountable for any loss or damage whatsoever by collision or otherwise which might happen to . . . . any vessel or any of the cargoes on board of the same while such vessel was in tow, whether arising from or occasioned by any accident or by any omission, breach of duty, mismanagement, negligence, or default of them, or their servants, or defect or imperfection in the steam tug, or the machinery, and that the owners or persons interested in the vessel, or the cargo on board the same, should undertake all liability for the above-mentioned matters. The plaintiffs the

owners of the *Guiana*, by way of further defence to the counter-claim, alleged that there was no breach of contract; that the *Guiana* was a reasonably fit and proper tug and had sufficient power to tow the *Maréchal Suchet* in such weather as might reasonably have been anticipated. In the alternative, they alleged that if she was deficient in horse power (which they denied), the owners were protected from liability for the consequences thereof by the terms of the contract; that the stranding was due to a vis major, namely, the unexpected violence of the weather, which could not reasonably have been anticipated. They further alleged, alternatively, that the stranding was an accident for the consequences of which the plaintiffs were, by the express terms of the towage contract, exempt from liability.

1910. May 12, 13, 30; June 25. *Aspinall, K.C.*, and *W. N. Raeburn*, for the plaintiffs the owners, masters, and crews of the steam tugs *Guiana*, *Columbia*, *Vincia*, and *Badia*.

Laing, K.C., and *A. E. Nelson*, for the plaintiffs the owners, masters, and crews of the steam tugs *Sun II.* and *Sun III.*

A. D. Bateson, for the plaintiffs the coxswain and the crew of twenty-five of the Margate surf lifeboat *Friend to All Nations*.

Hugh C. S. Dumas, for the plaintiffs Arthur Polley and others the company of lifeboatmen at Walton-on-Naze, twenty-five in number, who controlled and provided the crew of the volunteer lifeboat *True to the Core*.

Baden Powell, K.C., and *C. Robertson Dunlop*, for the plaintiffs the owners, master, and crew of the steam tug *Champion*.

Lauriston Batten, K.C., and *D. Stephens*, for the defendants, and counter-claimants, the owners of the sailing ship *Maréchal Suchet*, her cargo and freight.

In addition to the cases mentioned in the judgment the following were cited:—By counsel for the tugs *Guiana*, *Columbia*, *Vincia*, and *Badia*, *Steel* v. *State Line Steamship Co.* (1); *Robertson* v. *Amazon Tug and Lighterage Co.* (2); *Randall* v. *Newson*. (3) By counsel for the tugs *Sun II.* and *Sun III.*, *The Glengyle*. (4) By counsel for the lifeboat *Friend to All*

(1) (1877) 3 App. Cas. 72.
(2) (1881) 7 Q. B. D. 598.
(3) (1877) 2 Q. B. D. 102.
(4) [1898] P. 97; [1898] A. C. 519.

1910

THE MARÉCHAL SUCHET.

Nations, The Cayo Bonito. (1) By counsel for the lifeboat *True to the Core, The Pickwick.* (2) By counsel for the tug *Champion, The Undaunted* (3); *The Maude* (4); *The Cambrian.* (5)

Cur. adv. vult.

July 27. THE PRESIDENT (SIR SAMUEL EVANS). In these consolidated actions various claims have been brought for salvage services rendered to the *Maréchal Suchet*, a French steel three-masted full-rigged ship of 1991 tons net register. The value of the ship, cargo and freight, has for salvage purposes been agreed at 9458*l.*

This vessel got aground on the Shingles Sand at 6 o'clock on the morning of Friday, February 18 in this year. She remained aground, embedded in the sand, until the morning of February 22, when she was towed away by the united efforts of some of the tugs. There are several claimants as salvors. The first set of claimants are the owners, masters, and crews of the steam tugs *Guiana, Columbia, Vincia,* and *Badia,* which belong to Messrs. Watkins & Co. The second set of claimants are the owners, masters, and crews of the steam tugs *Sun II.* and *Sun III.* The next set are the coxswain and crew of the volunteer lifeboat *Friend to All Nations;* the next, the coxswain and crew of the volunteer lifeboat *True to the Core;* and the last set, the owners, master, and crew of the steam tug *Champion.* Salvage services are admitted to have been rendered by the *Sun II.* and the *Sun III.* practically as pleaded, and also by the *Friend to All Nations.*

I will deal first of all with the claims of the plaintiffs other than those of Messrs. Watkins & Co., the owners of the four steam tugs first above mentioned. I need not go into all the facts. I have said that salvage services are admitted to have been rendered by the *Sun II.*, the *Sun III.*, and by the *Friend to All Nations,* substantially as pleaded, and I award the *Sun II.* 800*l.*, the *Sun III.* 500*l.*, and I overrule the tender in the case of the *Friend to All Nations,* and award her coxswain and crew 275*l.*

(1) [1904] P. 310.
(2) (1852) 16 Jur. 669.
(3) (1860) Lush. 90.
(4) (1876) 3 Asp. M. L. C. 338.
(5) (1897) 8 Asp. M. L. C. 263.

1910

THE MARÉCHAL SUCHET.

The President.

In my judgment (and I am also advised by the Elder Brethren whose valuable assistance I have here), the *True to the Core* did not render any services in respect of which salvage ought to be given. Therefore the claim of the *True to the Core* is not allowed. With regard to the *Champion*, I accept the story told by the witnesses for the *Maréchal Suchet* in preference to that told by the witnesses for the *Champion*. The result is that I am of opinion that the *Champion* is not entitled, either for "engaged" services or for any other services rendered, to any salvage compensation.

There remain the difficult questions with regard to the claims of the *Guiana*, the *Columbia*, the *Vincia*, and the *Badia*, all belonging to Messrs. Watkins & Co. The owners of those tugs are hereinafter called the plaintiffs. On February 14, 1910, the *Guiana* was engaged to tow the *Maréchal Suchet* from Falmouth to London for 80*l*. The tug and tow started from Falmouth about 10 o'clock in the morning of the 16th and proceeded towards London. About 6 o'clock in the evening of the 17th, when off Dungeness, the *Maréchal Suchet* took on board a compulsory pilot. The vessels passed the Prince's Channel lightship about 1.50 A.M. on the 18th, and not long afterwards the *Maréchal Suchet* and her tug were driven to leeward, the wind being south-west. The tug could not hold the vessel, and for two to three hours the ship and tug went to leeward, and very little headway was made towards the west. About 6 A.M. the vessel took the ground, and the tug became "impotent" to deal with her. The question is whether the towage contract was ended or superseded or suspended, and whether the *Guiana* is entitled to salvage remuneration for any services afterwards rendered. The towing contract was, as stated, to tow the vessel from Falmouth to London for 80*l*. The telegrams and letters referring to it were put in, as was also the contract note itself, dated February 14, 1910.

It was contended for the plaintiffs that the contract was for a specified or named tug, the *Guiana*, and that, as the *Guiana* was supplied, the tug contractors fulfilled their contract, and that the owners and master of the *Maréchal Suchet* undertook all responsibility as to the efficiency of the tug. I decide against that

1910

THE MARÉCHAL SUCHET.

The President.

contention, after looking at the letters and telegrams. Moreover, the contract note of February 14, which is pleaded by the plaintiffs in their defence to the counter-claim, does not name or make any reference to the *Guiana*. The contract, therefore, was for the towage of the *Maréchal Suchet* by a tug to be supplied by the plaintiffs. This being so, the owners of the tug must be taken to have contracted that the tug should be efficient, and that her crew, tackle, and equipment should be equal to the work to be accomplished in weather and circumstances reasonably to be expected; and that reasonable skill, care, energy, and diligence should be exercised in the accomplishment of the work. On the other hand, they did not warrant that the work should be done under all circumstances and at all hazards, and the failure to accomplish it would be excused if it were due to vis major or to accidents not contemplated, and which rendered the doing of the work impossible. Did the owners of the tug in this case fulfil their contract, or were they prevented from doing so by vis major, or by any such uncontemplated accidents? These are the questions which arise on the claim for salvage. Other questions arise on the counter-claim, having regard to the special terms and conditions of the towage contract.

The Court is, and ought to be, careful to scrutinize a claim for salvage by a tug engaged to tow. It is essential in the public interest, for obvious reasons, that the towage contract should not be easily set aside, and a salvage service substituted for it. A tug ought to make a clear case before she can convert herself into a salvor. The vessel while in tow of the tug took the ground. The tug might have been in herself of insufficient power; or she might have become inefficient for the work by reason of an inefficient crew, or by reason of inadequate tackle or equipment, such, for instance, as an unclean boiler, or too little coal, or coal of too poor a quality; or by reason of the failure of the crew in the performance of their work, for instance, in working the engines, in stoking, or in keeping up steam. The burden of proof is upon the plaintiffs. It is a twofold burden. They must shew that they were not wanting in the performance of the obligations resting upon them under the towage contract; and they must also account for the stranding of the vessel by shewing

1910

THE MARÉCHAL SUCHET.

The President.

something like vis major, or an inevitable accident. In the words of Brett L.J. in *The Robert Dixon* (1), "The plaintiffs, being under a towage contract, bring this action, in which they assert that the towage service was altered into salvage; and it seems to me that the plaintiffs are in this position, that it lies on them to shew that the change occurred without any want of skill on their part, but by mere accident over which they had no control. The burden of proof on both the affirmative and the negative issues is on the plaintiffs, that is, both that there was an inevitable accident beyond their control, and that they shewed no want of skill." The very fact that the tug was unable to tow the vessel, that is, unable to do the work which the plaintiffs contracted to do, is evidence that she was inefficient, or that there was inefficiency or want of care or skill or energy or diligence on the part of her master or crew: see *The Ratata* (2); see also per Lord Halsbury in the same case in the House of Lords. (3)

The plaintiffs entirely failed to account for the stranding by vis major, or by any circumstance which could not reasonably be expected, or by any inevitable accident. The weather was not worse than, or even as bad as, was to be expected in the channel at that time of the year. The master of the tug admitted this, and the owner of the tug also said, "She ought to expect bad weather in February. You may get very strong gales, and often do." That is the result of the evidence. I think that the best evidence as to the state of the weather at the place where the difficulties were encountered is to be obtained from the weather reports of the Prince's Channel lightship. Those reports were produced, and they shew that at midnight on the Friday the force of the wind was 4; at 3 A.M. force 6 to 7, with squalls; and at 6 A.M. also 6 to 7, with squalls. This means that, at the worst, the wind blew with a force between a strong breeze and a moderate gale. No great reliance was placed on the squalls—probably because for two or three hours the tug was continuously unable to prevent the tow going somewhat to

(1) (1879) 5 P. D. 54, at p. 57.

(2) [1897] P. 118, per Lord Esher M.R., at pp. 126, 127; per Lopes L.J., at p. 128; and per Chitty L.J., at p. 130.

(3) [1898] A. C. 513, at p. 517.

1910

THE MARÉCHAL SUCHET.

The President.

leeward. The log of the *Guiana* makes no mention of squalls. There was a suggestion that the difficulty of the tug was due to the vessel having been on a long voyage and to her bottom being dirty. This was not pleaded, and I do not think that the state of the bottom of the vessel had anything to do with the stranding. It was argued that, apart from the allegation of insufficiency of power in the tug, the defendants did not allege negligence; but it is not necessary to plead negligence in such a case to defeat a salvage claim: see *The Minnehaha*. (1) The tug was built in 1885, but she had been supplied with a new boiler about twelve or thirteen years ago. She used salt water in the boilers. There was no evidence when the boilers or tubes were last cleaned. She had been overhauled in January, 1910. Her indicated or effective horse power was between 550 and 600, although she was put down as being 1100 horse power in the plaintiffs' statement of claim—this having been pleaded, as Mr. Watkins said, "for the purpose of a salvage claim." The conclusion to which I have come is that the plaintiffs have completely failed to account for the accident by vis major or any outside cause, and therefore the prima facie case against them has not been dislodged.

In my opinion, therefore, the plaintiffs, having failed in their towage contract, cannot in the circumstances of this case claim as salvors. They attempted to tow off the vessel for five tides, i.e., in all for thirteen hours, but did not succeed in rendering any valuable service. For the three tides following the *Guiana* did nothing, on account of the weather having got much worse. Then, on the morning tide of February 22, she joined other tugs for about three-quarters of an hour in trying to get the vessel afloat. They succeeded; whereupon, at about 10.30 A.M. on that day, the *Guiana*, in the words of the statement of claim, "resumed her towage contract." In my view, what she did she ought to have done as the tug under the towage contract, in the circumstances of the case.

It was admitted by counsel for the plaintiff owners that if they were not entitled to salvage as owners of the *Guiana*, they were not entitled as owners of their other three tugs,

(1) (1861) Lush. 335.

1910

THE MARÉCHAL SUCHET.

The President.

the *Columbia*, the *Vincia*, and the *Badia*. It was contended, however, that the masters and crews of all four tugs were entitled. In my opinion the master and crew of the *Guiana* are not entitled, as they performed no more than their duties in the towage service, and they have not satisfied me that they acted with efficiency or skill and care on board the *Guiana*. It is left in doubt whether the accident was due solely to the inefficiency of the tug supplied, or to her condition and management combined: compare *The Duc d'Aumale*. (1) As to the masters and crews of the other three tugs, they did perform some "engaged" services, although they did not, in my opinion, contribute to the ultimate salvage. In respect of these services I allow in the case of the *Columbia* 55*l*., in the case of the *Vincia* 20*l*., and in the case of the *Badia* 35*l*.

There remains the counter-claim of the defendants. The conditions which form part of the towage contract are very sweeping, but I cannot say they do not apply. I think it is for the defendants, who are plaintiffs upon the counter-claim, to establish the case which they have pleaded, namely, the inefficiency of the tug. There is no allegation other than that in the pleadings. As I have said, it is left in doubt in this case whether the accident was due solely to the inefficient condition of the tug and its equipment, or partly to that, and partly to want of skill, care, and energy in its management by the master and crew. On the whole I think that, although the conditions cannot enure to the benefit of the plaintiffs in the salvage claim, when the contract is alleged by the defendants, as plaintiffs on the counter-claim, and the counter-claim is for damages for a breach of the contract, the conditions must be looked at, and I think, in this case, they afford a defence to the counter-claim.

The results accordingly are—(1.) upon the claims of the owners, master, and crew of the *Guiana* there will be judgment for the defendants, with costs; (2.) upon the claims of the masters and crews of the *Columbia*, *Vincia*, and *Badia* there will be judgment for them for 55*l*., 20*l*., and 35*l*. respectively, with costs; (3.) upon the claims of the owners, masters, and crews of the *Sun II.* and *Sun III.* there will be judgment for them for

(1) [1904] P. 60.

1910.

THE MARÉCHAL SUCHET.

The President.

800*l.* and 500*l.* respectively, with costs; (4.) upon the claim of the coxswain and crew of the *Friend to All Nations* there will be judgment for them for 275*l.*, with costs, making together a total award of 1685*l.*; (5.) upon the claim of the lifeboat *True to the Core* there will be judgment for the defendants, without costs; (6.) upon the claim of the owners, master, and crew of the *Champion* there will be judgment for the defendants, with costs; and (7.) upon the counter-claim there will be judgment for the plaintiffs (the defendants on the counter-claim), with costs of the counter-claim.

Solicitors for plaintiffs the owners, masters, and crews of the *Guiana, Columbia, Vincia,* and *Badia: Clarkson & Co.*

Solicitors for plaintiffs the owners, masters, and crews of the *Sun II.* and *Sun III.*, and for the lifeboat *Friend to All Nations: Lowless & Co.*

Solicitors for plaintiffs Arthur Polley and others, the crew of the lifeboat *True to the Core: Dubois & Co., for Chamberlin & Talbot, Great Yarmouth.*

Solicitors for plaintiffs the owners, master, and crew of the *Champion: C. J. Smith & Hudson.*

Solicitors for defendants, and counter-claimants, the owners of the *Maréchal Suchet,* her cargo and freight: *Stokes & Stokes.*

T. L. M.

[DIVISIONAL COURT.]

1910
Nov. 1, 7.

THE KINGSLAND.

Admiralty—Ship—Charterparty—Demurrage—Custom of Port—Discharge by Harbour Authority—Delay not attributable to Charterer.

By charterparty it was provided that a cargo of pit props should be discharged with the customary steamship despatch as fast as the steamer could deliver during the ordinary working hours of the port, but according to the custom thereof, and should the steamer be detained beyond the time stipulated as above, demurrage should be paid at 4*d.* per net registered ton per day, and pro rata for any part thereof. The discharge was to be effected by the receiver's stevedore, the steamer paying so much per fathom; but, by the custom of the port, the harbour authority discharged the cargo, and some delay occurred. In an action for demurrage brought by the shipowner against the charterer:—

Held, that the charterer was not liable for delay due to circumstances beyond his control, that is to say, he was not responsible for the acts of an authority who was not his servant or agent, or was no more his agent than that of the shipowner.

The dicta in *Weir* v. *Richardson*, (1897) 3 Com. Cas. 20, followed.

Appeal by plaintiffs, Herbert Davies-Evans and Herbert Davies-Evans the younger, both of Lampeter, bankers, owners of the steamship *Kingsland*, and cross-appeal by the defendants, Ladoga, Limited, merchants of London, charterers, against a decision of the judge of the Swansea County Court, in favour of the defendants, in an action for demurrage, or damages for detention of the *Kingsland*.

By charterparty, dated October 9, 1909, made between the plaintiffs' agents, R. W. S. Sutherland and E. C. Downing, as managers of the plaintiffs' steamship *Kingsland*, and the defendants, it was agreed that the steamship should load a cargo of pit props at a loading place in Finland, and proceed therewith to Swansea.

The *Kingsland* was duly loaded in accordance with the charterparty, and arrived at Swansea on November 17, where, at the suggestion of the defendants, she was berthed by the Swansea Harbour Trust in the new King's Dock. By the terms of the charterparty the cargo had to be discharged with the customary steamship despatch as fast as the steamship could deliver during

1910

THE KINGSLAND.

the ordinary working hours of the port, but according to the custom thereof, Sundays, general or local holidays (unless used) excepted, and it was provided that, should the steamer be detained beyond the time stipulated as above for loading and discharging, demurrage should be paid at 4*d.* per net registered ton per day, and pro rata for any part thereof. The discharge was to be effected by the receiver's stevedore, steamer paying 3*s.* per fathom.

The discharge of the steamship commenced on Thursday, November 18, at 11 A.M., and was completed on December 7 at 10 A.M. Excluding Sundays and holidays, the total number of days occupied in discharging was sixteen, and the plaintiffs contended that, if the defendants had discharged the vessel in accordance with the terms of the charterparty, the time occupied would have been ten days. The net registered tonnage of the *Kingsland* was 1808 tons, and the plaintiffs therefore claimed 180*l.* 16*s.*, being six days' demurrage at the rate of 4*d.* per registered ton per day, or 30*l.* 2*s.* 8*d.* per day.

The defendants denied that they detained the *Kingsland* for the period mentioned above or at all, and alleged that the steamship was discharged by the Swansea Harbour Trust acting solely for and on behalf of the plaintiffs, whose duty it was under the charterparty to discharge the vessel. If (which was not admitted) there was any duty on them to take any part in the discharge, the discharge was effected by the Swansea Harbour Trust acting on behalf of and as agents for the plaintiffs and defendants. Alternatively the defendants alleged that, if (which was denied) the steamship was discharged by the Swansea Harbour Trust acting for and as agents for the defendants only, the Swansea Harbour Trust used all reasonable diligence in discharging the steamship, and the cargo was discharged with the utmost practicable despatch, having regard to the custom of the port, the facilities for delivery, and all the existing circumstances, that is to say, if there was any delay, it was due to circumstances beyond the defendants' control.

With reference to the circumstances affecting the discharge the defendants relied upon the following:—(*a*) that the Swansea Harbour Trustees always act as stevedores in the case of the

discharge of a cargo of pit props; (*b*) that the only available and suitable berth for the steamship at the port was the berth that was occupied by the steamship in the new King's Dock; (*c*) that the only practicable means of discharging the cargo was by means of the two hydraulic travelling cranes then erected, instead of the six now available on the quay; (*d*) that there was a general holiday on the occasion of the formal opening of the dock on November 23; (*e*) that by the custom of the port the cargo had to be discharged on to the quay, and that delay occurred owing to wet weather on part of November 24, 25, 26, 27, 28, 29, 30, and December 1, 2, 4, 6; and on December 3, owing to a gale of wind, the steamship parted her mooring, involving a delay of four working hours.

Alternatively, whilst denying all liability, the defendants brought into Court the sum of 30*l.* 2*s.* 8*d.*, and said that that sum was sufficient to satisfy the whole of the plaintiffs' claim.

On July 13, 1910, the learned county court judge gave judgment for the defendants with costs "on the defence raised, based on *Weir* v. *Richardson*" (1), namely, that where under a charter-party no time is fixed for the discharge, and the whole work of discharge is, in accordance with the practice of the port, put into the hands of a harbour authority, the charterers are not liable for delay caused by the negligence of the harbour authority, and the learned judge added, "I find that there was negligent delay of three days which would have entitled plaintiffs to 90*l.* as damage for demurrage."

The plaintiffs by their notice of appeal, besides disputing the findings of fact, gave as grounds for the appeal that the learned judge was wrong in law in holding (*a*) that the defendants were not responsible for the steamship *Kingsland* having been ordered or directed to the King's Dock at Swansea; (*b*) that the Swansea Harbour Trustees in discharging the cargo were in part the servants or agents of the plaintiffs, and in not holding that the said trustees were the servants or agents of the defendants only; (*c*) that if the plaintiffs were right on the foregoing questions they would be entitled to but three days' demurrage for the said vessel, and in not holding that they were entitled

(1) 3 Com. Cas. 20.

1910

THE KINGSLAND.

to the six days claimed on defendants' admissions that the wharf in the said dock at which the steamer was discharged was at the time of such discharge only partly equipped, and thus had and used in discharging but two cranes out of the six now there and which form its complete equipment.

By their cross-notice of appeal the defendants gave as grounds for the appeal (1.) that there was no evidence upon which the learned judge could find that the plaintiffs would be entitled to the sum of 90*l.* 8*s.* or any other sum in respect of demurrage; (2.) that the learned judge misdirected himself in disregarding evidence relating to the custom of discharge at the port of Swansea.

1910. Nov. 1. *D. C. Leck*, for the appellants (plaintiffs), the owners of the *Kingsland*.

Bailhache, *K.C.*, and *Jowitt*, for the respondents and cross-appellants (defendants), the charterers of the *Kingsland*.

The arguments of counsel sufficiently appear from the judgment. In addition to the cases therein mentioned the following were referred to:—*Postlethwaite* v. *Freeland* (1); *The Jaederen* (2); *Lyle Shipping Co.* v. *Cardiff Corporation* (3); *Rodenacker* v. *May & Hassell, Ld.* (4); *Temple, Thomson & Clarke* v. *Runnalls.* (5)

Cur. adv. vult.

Nov. 7. The judgment of the COURT (Sir Samuel Evans, President, and Bargrave Deane J.) was delivered by

THE PRESIDENT (SIR SAMUEL EVANS). In this case the plaintiffs appeal against the judgment of the learned county court judge upon the findings of fact, and upon the law. Having regard to the evidence given, and to the course pursued by the plaintiffs at the trial, we do not feel justified in disagreeing with the finding that there was a custom in the port of Swansea that the discharging of cargoes of pit props was to be done by the harbour authority, and not by any stevedore to be named by the receivers of the cargo.

(1) (1880) 5 App. Cas. 599.
(2) [1892] P. 351.
(3) [1900] 2 Q. B. 638.
(4) (1901) 6 Com. Cas. 37.
(5) (1902) 18 Times L. R. 822.

It was admitted by the respondents that they could not upon this appeal dispute the finding that, if they (the defendants) were liable in law for the acts of the harbour authority, they were liable for three days' demurrage. On the other hand we are not able to disturb the finding by saying that the number of days' demurrage should be six days, as contended for by the appellants. Therefore, in the event of the defendants being liable for any demurrage, the number of days should be three, as decided in the Court below.

As to the law, the learned county court judge followed the opinions expressed by Bigham J. in *Weir* v. *Richardson*. (1) That is not a decision ; but the opinions were expressed by an eminent judge of great experience in commercial law thirteen years ago. Counsel for the appellants did not argue that the opinions did not state the law accurately, and did not ask us to disapprove of them. We adopt them. But counsel for the appellants contended that the law as so expressed did not apply to the present case by reason of the words in the present charterparty : "Should the steamer be detained beyond the time stipulated as above for loading and discharging, demurrage shall be paid at 4*d*. per net registered ton per day, and pro rata for any part thereof."

Since the hearing we have seen the charterparty and the bill of lading in the case of *Weir* v. *Richardson* (1), and we find that the following clause appeared in the charterparty, and was incorporated in the bill of lading :—"It is agreed that for each and every day's detention by default of the said parties of the second part or their agents 4*d*. sterling or its equivalent per register ton per day shall be paid day by day by the said parties of the second part or their agents to the said party of the first part or his agent."

The argument was that the words in the present charterparty amounted to an express contract by the charterers to pay demurrage at a fixed rate if the time stipulated for discharging were exceeded, however the delay was caused. We are of opinion that these words do not create a fresh or independent liability on the defendants, if they are not, according to the rest of the contract, liable at all for demurrage, which is the result of the doctrine of *Weir* v. *Richardson* (1) ; and the words relied on do not

(1) 3 Com. Cas. 20.

1910

THE KINGSLAND.

prevent the application of those doctrines. The principle upon which they are founded appears to be that the charterers are not responsible for the acts of an authority who, in the circumstances, are not their servants or agents, or are no more their agents than they are the agents of the shipowners.

The matter may be regarded from another point of view, in the light of the cases dealing with the liability of charterers for delay due to circumstances beyond their control. By the custom referred to, it was for the harbour authority to discharge the cargo. The defendants could not control the authority, or the use made by the authority of the available appliances They had no more control over the activity of the harbour authority's workmen than they would have over a strike of those workmen, or over other circumstances existing in the dock.

It has been laid down in the long list of cases culminating in *Hulthen* v. *Stewart & Co.* (1) that a provision like the one in this charterparty requires the customary steamship despatch in discharging, "having regard to the custom of the port, the facilities for delivery possessed by the particular vessel under contract of affreightment, and all other circumstances in existence at the time, not being circumstances brought about by the person whose duty it is to take delivery, or circumstances within his control." One of the circumstances in existence attending the discharge of this particular cargo was that the discharging was to be done by the harbour authority. There was delay by them in discharging. The circumstances leading to the delay were not brought about by the defendants; and the conduct of the authority and their negligence—which has been found—were not within the defendants' control.

Upon these grounds we think the decision of the learned judge should be upheld, and the appeal is dismissed with costs. The cross-appeal is also dismissed with costs.

Solicitors for appellants (plaintiffs): *Williamson, Hill & Co., for Ingledew & Sons, Cardiff.*

Solicitors for respondents (defendants): *Trinder, Capron & Co.*

(1) [1903] A. C. 389.

T. L. M.

THE WEST COCK.

1910

Oct. 17, 18, 19, 31.

Admiralty—Ship—Towage Contract—Defective Towing Gear—Warranty of Fitness of Tug—Exemptions applying only after Towage began.

Whilst the defendants' tug was towing the plaintiffs' vessel from Birkenhead to the Canada Dock, Liverpool, the towing gear of the tug carried away, with the result that the plaintiffs' vessel fell against the pierhead at the entrance to the dock and sustained damage.

In an action for breach of the contract of towage, the defendants relied on a condition in the contract by which they were "not to be responsible for any damage to the ship they have contracted to tow arising from any perils or accidents of the seas rivers or navigation collision straining or arising from towing gear (including consequence of defect therein or damage thereto) and whether the perils or things above mentioned or the loss or injury therefrom be occasioned by the negligence default or error in judgment of the pilot master officers engineers crew or other servants of the tug owners":—

Held by the President (Sir Samuel Evans), that the defendants were liable, as there was an implied warranty in the contract of towage that the tug supplied was duly equipped and fit for service; but the cause of the damage sustained by the plaintiffs' vessel was the defective condition of the rivets attaching the towing gear of the tug to her bunker casing. This defect was not covered by the contract, the conditions of which only applied to circumstances occurring after the commencement of, and during, the towage, and not to the state of things existing before the towage began.

Action of damage for breach of a contract of towage.

The plaintiffs were David MacIver, Sons & Co., Limited, of Liverpool, owners of the steamship *Araby*. The defendants were the Liverpool Screw Towing and Lighterage Company, owners of the tugs *West Cock* and *South Cock*.

On January 12, 1909, whilst the *Araby*, a steel screw steamship of 3303 tons gross register, was lying in the Morpeth Dock, Birkenhead, with a part cargo of about 700 tons weight, together with about 1700 tons of bunker coal on board, the defendants verbally agreed with the plaintiffs for reward to supply two steam tugs to tow the vessel to the Canada Dock, Liverpool, and to dock her there.

In pursuance of the contract the defendants sent the steam tugs *West Cock* and *South Cock* to the Morpeth Dock. The *West Cock* was made fast to the *Araby* astern by means of two

1910

THE WEST COCK.

six-inch manilla hawsers each with a scope of about ninety feet. Each of the hawsers was secured to a towing hook on board the *West Cock*, and was thence carried round the bitts on the *Araby*, thence back over the towing hook on the *West Cock*, and finally back to the bitts on the *Araby* and there made fast. The other steam tug, the *South Cock*, was made fast ahead of the *Araby*, and that vessel was then towed towards the Canada Dock; but when the *Araby* had been brought, about 3 P.M., at high water, close alongside the knuckle of the south jetty off the entrance to the Canada Dock, the towing hooks and gear of the *West Cock* carried away, and, in consequence, the *Araby* struck the knuckle of the jetty with her starboard side, and received extensive damage.

By their statement of claim the plaintiffs alleged that by the contract of towage "the defendants impliedly undertook and/or warranted that the steam tugs to be supplied by them would be properly equipped and fit in all respects to undertake and efficiently perform the intended service," and that, in sending the steam tugs *West Cock* and *South Cock* "to perform the intended service, the defendants thereby warranted that each of the tugs was properly equipped and fit in all respects to undertake and efficiently perform the intended service," but "the towing hooks, gear, equipment and structure of the *West Cock*, in breach of the implied undertaking and/or warranties, were unfit" for the intended service "in that: (*a*) the towing gear was not provided with a member to take the upward component of the towing strain, and/or (*b*) there were two towing hooks, a centre and a starboard hook, each of which was held between horizontal plates by a vertical pin, (*c*) the vertical pins were not held in place at the bottom by a sufficient or any fastening and were not in themselves of sufficient strength, (*d*) neither of the hooks was able to swivel in a vertical direction, (*e*) the attachments of the upper portion of the towing gear were not strong enough (the attachments consisted of the upper horizontal plate rivetted to an angle bar, which was rivetted to the bunker casing), (*f*) the use of the starboard hook transmitted undue strains to the end rivets attaching the towing gear to the bunker casing, (*g*) the lower horizontal plate was not doubled and was not of sufficient strength in the way of the starboard hook; and (*h*) by

reason of the defects specified in paragraphs (*a*) to (*g*) the towing gear was not of a proper design and was not strong enough to withstand the strains likely to be put upon it."

Alternatively the plaintiffs alleged that it was an implied term of the contract that the defendants would take reasonable care that the steam tugs to be supplied by them should be properly equipped and fit in all respects to undertake and efficiently perform the intended service, but the defendants failed to take any or reasonable care in that they omitted: (*a*) to make any or any proper and sufficient inspection of the *West Cock's* towing gear, and/or (*b*) to provide the *West Cock* with towing gear properly designed and of sufficient strength.

By their defence and counter-claim the defendants alleged that the verbal agreement to tow the *Araby* was subject to the ordinary conditions of towage on which the defendants supply and have supplied tugs to the plaintiffs and others, namely: "The tug owners are not to be responsible for any damage to the ship they have contracted to tow arising from any perils or accidents of the seas rivers or navigation collision straining or arising from towing gear (including consequence of defect therein or damage thereto) and whether the perils or things above mentioned or the loss or injury therefrom be occasioned by the negligence default or error in judgment of the pilot master officers engineers crew or other servants of the tug owners."

The defendants did not admit that there was implied in the towage contract the undertaking or warranty, or, alternatively, the term mentioned in the statement of claim, and they alleged that "the *West Cock* was reasonably fit in every respect to perform the service and all reasonable care was taken in that behalf but her towing hooks and their foundations were carried away owing to the unusual or excessive strains put upon them during the towage. The strains were unusual and excessive owing to the wind being a west north west gale and the sea heavy, the *Araby* being high out of the water with her port side exposed to the full force of the wind and having no steam on the main engines, the scope of tow rope given by the *Araby* being fifteen fathoms and the tug towing at full speed in obedience to orders

1910

THE WEST COCK.

given by some person on board the *Araby* (believed to be one of the officers) shortly before the towing hooks and their foundations carried away."

The defendants further alleged that if the *West Cock* was unfit or reasonable care was not taken to make her fit (which was denied) the defendants were protected from liability for the alleged damage to the *Araby* by the conditions of towage set out above, and, alternatively, the defendants said that the damage to the *Araby* was caused or contributed to by the negligence of the plaintiffs or their servants in ordering the tugs to tow the *Araby* in the weather and other conditions mentioned above, the orders referred to being given by some person on board the *Araby* (believed to be in charge of her) shortly before the *West Cock* made fast to her in the Morpeth Dock.

By way of counter-claim the defendants alleged that they had suffered damage amounting to 43*l.* 11*s.* 3*d.* by reason of the carrying away of the tug's towing hooks and their foundations in the circumstances alleged in the defence, and that by the implied terms of the towage contract the plaintiffs agreed to indemnify the defendants in respect of such damage. Alternatively the defendants alleged that this damage was caused by the negligence of the plaintiffs or their servants in ordering the tug to tow the *Araby* in the weather and other conditions mentioned above.

1910. Oct. 17, 18, 19. *Leslie Scott, K.C.*, and *A. T. Miller*, for the plaintiffs, the owners of the *Araby*.

Aspinall, K.C., and *C. Robertson Dunlop*, for the defendants, the owners of the tugs *West Cock* and *South Cock*.

The facts and the arguments of counsel fully appear from the judgment. In addition to the cases mentioned therein, the following were referred to by counsel for the plaintiffs on the question of the burden of proof being on the defendants to rebut the presumption of liability arising on the admission that the towing gear carried away : *The Swanland* (1); *The Indus* (2); *The Merchant Prince*. (3)

Cur. adv. vult.

(1) (1855) 2 Spinks, E. & A. 107. (2) (1886) 12 P. D. 46.
(3) [1892] P. 179.

1910

THE WEST COCK.

Oct. 31. THE PRESIDENT (SIR SAMUEL EVANS). This is an action for breach of a contract of towage. The plaintiffs are the owners of the steel screw steamer *Araby*, and the defendants are the owners of the tug *West Cock*.

The contract was made on January 12, 1909, for the towage of the *Araby* from the Morpeth Dock, Birkenhead, to the Canada Dock, Liverpool. Two tugs belonging to the defendants were engaged, namely, the *West Cock* and the *South Cock ;* but, for the purposes of this case, the tug *West Cock* is the only one that need be considered.

The substance of the case for the plaintiffs is that, by reason of the inefficiency of the tug *West Cock*, the towing gear of the tug carried away and fell overboard ; and that, as the result of this, the *Araby* was driven against the knuckle of the pierhead at the entrance to the Canada Dock, and was damaged.

There is a counter-claim by the owners of the tug against the owners of the steamer, which will be dealt with later.

The facts were gone into in ample detail at the hearing. The theories advanced on either side were many and contradictory. It would not serve any useful purpose to attempt to set out all the facts and theories in this judgment. It is only necessary to state such of the facts, theories, and contentions as will make the conclusions at which I have arrived intelligible.

The distance from the Morpeth Dock to the Canada Dock is about two miles along and across the Mersey. For part of this distance the *West Cock* had been towing ahead of the *Araby*, with the tug *South Cock*. When near the end of the towing voyage, just outside the entrance to the Canada Dock, the *West Cock* came away from ahead, and was made fast to the stern of the *Araby*. This was done pursuant to the directions of the dockmaster, in order that the stern of the *Araby* might be pulled to the northward and westward, so that she might be properly headed for the entrance into the Canada Dock.

The *West Cock* was made fast by two sets of ropes. The ropes were six-inch manillas, and were supplied by the *Araby*. Each set consisted of an end and a bight on and round a hook on the *West Cock*, hereinafter called the "tug." Each set had therefore three lines of six-inch rope. On the tug were two hooks, one called the

1910

THE WEST COCK.

The President.

centre hook and the other the starboard hook. One set of ropes led from the starboard quarter of the steamer and was made fast to the centre hook of the tug, and the other from the port quarter to the starboard hook. These two hooks were placed between an upper plate and a lower table, to which they were connected by vertical pins. The table and plate were both connected with angle bars, which were fastened to an iron bulkhead or casing by means of rivets. The two hooks could move horizontally. There was a contest as to the vertical motion. The angle bar to which the top plate was connected was fastened to the bulkhead by eight rivets. The heads of the rivets were on the other side of the bulkhead, that is, the side of the bunker hold. While the towing was still proceeding, just outside the entrance to the Canada Dock, the top angle bar, the top plate, and the two hooks carried away and were lost overboard. They were never recovered. Of the towing gear, only the lower table and what was below it remained. The cause of the carrying away of the top angle bar, the top plate, and the hooks was the breaking of the eight rivets referred to. They broke on the towing gear side of the bulkhead. Some of the broken rivets projected on that side about one eighth of an inch from the surface of the bulkhead, and the others were broken flush with the bulkhead. The rivets, apart from the small broken parts, remained in the bulkhead, and the heads were on the bunker side of it. On the day after the accident the towing gear of the tug was temporarily repaired. In effecting these repairs the broken rivets were knocked out from the towing gear side into the bunker on the other side. The broken rivets were never produced after the accident. It is to be regretted that they were not preserved and produced. There was some correspondence about them, the effect of which in substance was that the defendants said that all the towing gear was lost overboard, and that there was nothing to produce. The plaintiffs, in their letter of February 25, 1909, asked specifically for the parts of the broken rivets or bolts. They were met with the same answer, that all the towing gear had been lost overboard.

It was clear, and beyond question, that the breaking of the rivets was the cause of the carrying away of the towing gear,

1910

THE WEST COCK.

The President.

and was, therefore, the cause of the *Araby* striking against the pier and suffering the damage which was alleged by the plaintiffs. As to the rivets, the plaintiffs alleged that the equipment of the *West Cock* was unfit in that (inter alia) (1.) the attachments of the top plate and the top angle bar by rivets were not strong enough; (2.) undue strains were transmitted to the rivets by reason of the structure of the towing hooks.

In answer to this, the case for the defendants was that all eight rivets were broken together by some great, unusual, and unexpected strain, alleged to be due wholly or partly to the weight of the tow, the wind, the sea, the tide, and the scope of the hawser between tug and tow. If the rivets had been in good condition the evidence on both sides was that they ought to have stood a very heavy, steady strain, namely, from ninety to ninety-nine tons. The plaintiffs attacked the design of the tug, and contended that it was faulty and rendered the tug inefficient. They alleged that the two gear hooks were rigid, had no vertical hinge or swivel, or vertical play, and that in consequence great leverage strains were transmitted to the fastenings of the gear. Elaborate calculations of these alleged leverage strains were given.

Upon the evidence I find that the centre hook was a swivel or hinge hook, and that the starboard hook had enough vertical play; and I find, and am also advised by the Elder Brethren, who are assisting me, that the tug was not faulty in design and was not inefficient upon that ground. Upon the other hand, the defendants contended, as I have said, that there was an unusual and excessive strain upon the towing gear and its connections because (1.) the scope of the towing hawser was too short, and (2.) because the wind, sea, and height out of the water of the *Araby* were unusual and unexpected. It was pleaded by the defendants that the scope of the hawser was given and determined by the *Araby*. This was not so. It was determined by the master of the tug. In this latter event the defendants contended that, if the tugmaster was wrong in deciding the scope of the hawser, they (the defendants) were exempted from liability by the conditions of the contract. Upon the evidence I find, and I am also advised, that there was no unusual or excessive

1910

THE WEST COCK.

The President.

strain, and no strain that might not reasonably be expected, due to the alleged causes, or any of them. The ropes did not part, and there was no buckling or disturbance of the casing.

Without going in further detail into the evidence, I will state the conclusions at which I have arrived as to the cause of the accident. I find that the accident was due to the weakness, fatigue, and defective condition of the eight rivets, and that at the time of the contract, and of the commencement of the towing operations, the tug *West Cock* was inefficient on this ground to perform the towage services which the defendants contracted to perform. I further find upon the evidence—in case these further findings should turn out to be material—that this inefficiency could have been ascertained by reasonable care, skill, and attention on the part of the tug owners; that no proper inspection of the tug was made by them or their servants before the towage contract was entered into; and that the last inspection before the contract was only an ordinary and perfunctory one, and did not extend to an examination of the rivets or fastenings between the towing gear and the bulkhead casing.

The question which has to be determined is whether the defendants are liable in these circumstances in view of the terms of the contract? The contract for the towage was verbal. Although there was an issue upon the pleadings as to the terms of the contract, there did not remain, after the evidence, any contest upon the matter. The contract was an ordinary contract for towage, subject to the conditions set out in the defence. These conditions are as follows: "The tug owners are not to be responsible for any damage to the ship they have contracted to tow arising from any perils or accidents of the seas rivers or navigation collision straining or arising from towing gear (including consequence of defect therein or damage thereto) and whether the perils or things above mentioned or the loss or injury therefrom be occasioned by the negligence default or error in judgment of the pilot master officers engineers crew or other servants of the tug owners."

Apart from any special terms or conditions, I endeavoured in *The Maréchal Suchet* (1), after a careful examination of the

(1) Ante, p. 1, at p. 12.

authorities, to state what I thought were the obligations of a tug owner under a towage contract. They were stated as follows: "The owners of the tug must be taken to have contracted that the tug should be efficient, and that her crew, tackle, and equipment should be equal to the work to be accomplished in weather and circumstances reasonably to be expected, and that reasonable skill, care, energy and diligence should be exercised in the accomplishment of the work. On the other hand, they did not warrant that the work should be done under all circumstances and at all hazards, and the failure to accomplish it would be excused if it were due to vis major or to accidents not contemplated, and which rendered the doing of the work impossible."

These obligations can, however, be got rid of or modified by express and apt terms in the contract, just as the obligations of a shipowner may be got rid of, or modified, in the case of the duty or obligation to provide a seaworthy vessel under a charter-party or a contract of affreightment. The primary obligation of a tug owner under a towage contract may be described as a duty to provide a tug which, at the time of the contract or at the commencement of the operations of towage under the contract, is efficient to perform the towage services which the tug undertakes to perform in circumstances reasonably to be expected; or as a representation, or an engagement, or a contract, or an implied engagement that the tug is reasonably efficient for that purpose. If my findings of fact in this case are justified, it matters not whether this primary obligation is an absolute one, so as to amount to a warranty of fitness or efficiency, or whether the obligation is satisfied by the tug owner proving that the unfitness or inefficiency was not discoverable or preventable by any care or skill, or by his proving that he was not aware of the unfitness or inefficiency, and that it could not be discovered by an ordinary inspection.

Unless the special conditions in this contract exonerate the defendants, upon my findings the defendants would be liable in any of the above views of their legal obligations. But, lest my findings of fact may not commend themselves to an appellate tribunal, it is necessary for me to state my view more particularly

1910

THE WEST COCK.

The President.

as to what the obligations are, apart from special conditions or exceptions.

In my opinion it is not sufficient for a tug owner in an action like the present to prove that he was not aware of any unfitness or inefficiency or that it could not be discovered by an ordinary inspection. At the lowest I think his obligation is to prove that the unfitness or inefficiency was not preventable or discoverable by care and skill. But is not the obligation at the outset greater than this? Is it not an obligation which is absolute and which therefore amounts to a warranty? I think it is. It is well established that the obligation under a charterparty or a bill of lading to provide a vessel which is "seaworthy," in the commercial and legal sense, is an absolute one and amounts to a warranty of seaworthiness; and this obligation has been described as "a representation and an engagement—a contract—by the shipowner that the ship . . . . is at the time of its departure reasonably fit for accomplishing the service which the shipowner engages to perform" (per Lord Cairns in *Steel* v. *State Line Steamship Co.* (1)); and as "a duty on the part of the person who furnishes or supplies the ship . . . . unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a 'warranty,' not merely that they should do their best to make the ship fit, but that the ship should really be fit" (per Lord Blackburn (2)).

It is as important that a tug which undertakes to tow a vessel in some cases for long distances and in varying circumstances, with lives and property at risk, should be efficient for the accomplishment of its work, as it is that a cargo laden ship should be seaworthy, and in this sense fit for the purposes of the services undertaken under a charterparty. The foundation of the obligation is the same in either case, namely, the fitness of the tug or the ship for the purpose of the services to be performed. This appears to be the ground of the decision in *The Undaunted* (3), and I observe that that case has been taken by text-writers to

(1) (1877) 3 App. Cas. 72, at p. 76. (2) 3 App. Cas. at p. 86.
(3) (1886) 11 P. D. 46.

establish that a tug owner warrants the fitness of the tug (see Carver on the Carriage of Goods by Sea, 3rd ed., s. 112, at p. 140).

The late Lord Justice Mathew in *Hyman* v. *Nye* (1) states that "the warranty of seaworthiness in the case of a ship has been traced in many recent cases to its source in the ordinary contract for hiring an article for a specific purpose." In *The Minnehaha* (2) Lord Kingsdown, in giving the decision of the Privy Council, says: "When a steamboat engages to tow a vessel for a certain remuneration from one point to another, she does not warrant that she will be able to do so, and will do so, under all circumstances and at all hazards; but she does engage that she will use her best endeavours for that purpose, and will bring to the task competent skill, and such a crew, tackle, and equipments, as are reasonably to be expected in a vessel of her class. She may be prevented from fulfilling her contract by a vis major, by accidents which were not contemplated, and which may render the fulfilment of her contract impossible, and in such a case, by the general rule of law, she is relieved from her obligations. But she does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task; because the performance of the task is interrupted, or cannot be completed in the mode in which it was originally intended, as by the breaking of the ship's hawser." This, I think, means, or at any rate is consistent with the construction, that there is, in a towage contract, first a warranty that at the outset the crew, tackle and equipments are efficient, and afterwards an implied obligation that competent skill and best endeavours should be exercised in the performance of the work.

It has been argued before me that the judgment of Lord Halsbury in the House of Lords in *The Ratata* (3) shews that only reasonable care and skill in providing an efficient tug is required by the contract; but it seems to me that the argument is not well founded. I think that the head-note is an accurate statement of the decision in that case. It runs:—"Held: that the appellants were bound to exercise reasonable care and skill in the conduct of the towage, and that, there being evidence of

(1) (1881) 6 Q. B. D. 685, at p. 690.

(2) (1861) Lush. 335, at p. 347.

(3) [1898] A. C. 513.

1910

THE WEST COCK.

The President.

failure in that respect, the respondents were entitled to sue the appellants for damages." The facts of that case were peculiar. When Lord Halsbury refers to "reasonable care and skill," and says that there was no contract of warranty, I think he was referring to the conduct of the towing operations after the towing had commenced. The decision is not, in my judgment, any authority for the proposition that the tug owners did not warrant the efficiency of the tug for the towage at the commencement of the towage.

If the matter were, or is, res integra, I see no reason whatever why the same kind of obligation as to efficiency or fitness should not attach to a marine contract of towage as attaches to a marine contract of carriage. But whether the ordinary contract be (as I think it is) a warranty of fitness, or an implied obligation to provide a tug in a fit and efficient condition so far as skill and care can discover its condition, a serious question remains, namely, whether, under the special terms of exemption in the contract in this case, the defendants are relieved from liability. Whatever the exact obligations of the tug owners may be, there are exceptions under which they seek to avoid, restrict, or minimize those obligations, and they must clearly make out that they are protected by these conditions. I think that the canon of construction to be applied is similar to that which has so frequently been applied in "seaworthiness" cases. Many illustrations can be given. In *Nelson Line* (*Liverpool*), *Ld.* v. *James Nelson & Sons, Ld.* (1) Lord Loreburn L.C. says: "The law imposes on shipowners a duty to provide a seaworthy ship, and to use reasonable care. They may contract themselves out of those duties, but unless they prove such a contract the duties remain and such a contract is not proved by producing language which may mean that and may mean something different. As Lord Macnaghten said in *Elderslie Steamship Co.* v. *Borthwick* (2), 'an ambiguous document is no protection.'"

In *Owners of Cargo of S.S. Waikato* v. *New Zealand Shipping Co.* (3) Collins L.J. said: "I am not sure that the shipowners did not really mean to cover by the exception all defects

(1) [1908] A. C. 16, at p. 19. (2) [1905] A. C. 93, at p. 96.
(3) [1899] 1 Q. B. 56, at p. 58.

at the beginning of the voyage whether latent or patent, I am inclined to think that they probably did mean to do so. But they are the persons setting up the exception, and who have to make out their exemption. I do not think they can sustain that onus, unless by unambiguous language they have excluded the liability which would prima facie rest upon them. I think that the language used in this case is far too ambiguous for that purpose."

This passage was cited and approved by Vaughan Williams L.J. in *Rathbone Brothers & Co.* v. *D. MacIver, Sons & Co.* (1); and Lord Selborne, in the well-known passage in his judgment in *Steel* v. *State Line Steamship Co.* (2), said: "The [excepted perils] are capable of, and ought to receive, a construction, not nullifying and destroying the implied obligation of the shipowner to provide a ship proper for the performance of the duty which he has undertaken."

In the case now before the Court I think the reasonable construction to place upon the conditions, and the construction which the owners of the *Araby* might reasonably, and would probably, put upon them, is that they apply to circumstances occurring after the commencement of, and during, the towage, and not to the state of things existing before the towage began. It is hardly conceivable that the conditions should be read as meaning "We will be responsible for inefficiency in any part of the tug except in the towing gear, but we will not be responsible for inefficiency in the towing gear itself"—that being one of the most important parts of the tug in respect of the service it has to perform. The words of exception relied upon by the defendants occur in the middle of a clause which appears to deal with matters which happen during the towing voyage. The clause begins with words obviously referring to the towing voyage, and ends with an exemption from the negligence of the tug owners' servants, and the pilot, who, of course, would only come upon the scene in the course of the towing voyage. In corroboration of this construction I may refer, by way of illustration, to an American case decided in the Supreme Court of the United States, *The Caledonia* (3), where

(1) [1903] 2 K. B. 378, at p. 384. (2) 3 App. Cas. 72, at p. 85.
(3) (1895) 157 U. S. 124, at p. 138.

1910

THE WEST COCK.

The President.

the exceptions in a bill of lading were much in the same terms and order as in the present case, although they were more extensive. It was there held (in accordance with the English decisions) that exceptions were to be construed most strongly against the shipowner, and that he was not exempted from liability for damage through the breaking of a shaft due to a latent defect which existed before and at the commencement of the voyage. The following passage occurs in the judgment of the Court: "Moreover, the words, 'delays, steam boilers and machinery, or defects therein,' formed part of a long enumeration of the causes of damage, all the rest of which related to matters subsequent to the beginning of the voyage, and, by another familiar rule of construction, they should be treated as equally limited in their scope." I respectfully agree with that passage and with the judgment of that eminent tribunal. This case was followed in the same Court by a later one, *The Carib Prince* (1), and the following passage (referring to *The Caledonia* (2)) is taken from the judgment: "The principle upon which the ruling rested was that clauses exempting the owner from the general obligation of furnishing a seaworthy vessel must be confined within strict limits, and were not to be extended by latitudinarian construction or forced implication so as to comprehend a state of unseaworthiness . . . . at the commencement of the voyage."

The principles and canon of construction adopted and applied in these cases ought also, in my judgment, to be applied in the construction of the towage contract in the present case. For instances where the language was held to be not sufficiently express and unambiguous to exempt the shipowner seeking to rely upon exceptions, see *Owners of Cargo on Ship Maori King* v. *Hughes* (3) and *Owners of Cargo of S.S. Waikato* v. *New Zealand Shipping Co.* (4) If the tug owners in the present case wished to escape their prima facie liability for defects or inefficiency existing before the towage began, they ought to have made that clear by express and unmistakable words, as was

(1) (1898) 170 U. S. 655, at p. 659.
(2) 157 U. S. 124, at p. 138.
(3) [1895] 2 Q. B. 550.
(4) [1899] 1 Q. B. 56.

done, for example, in *The Cargo ex Laertes* (1) and in *Rathbone Brothers & Co.* v. *D. MacIver, Sons & Co.* (2); although in the latter case the shipowners were held not exempted by reason of subsequent words in the contract.

In my judgment the words used in the conditions in the present case are not sufficiently clear to exempt the tug owners from liability. A reasonable and sufficiently wide meaning is given to them by reading them as referring only to perils, accidents, defects, damage, negligence, default, or error in judgment after the work of towing began, and during the performance of the work. I may add, although I do not desire my judgment to rest upon it, that the defendants could not complain if a strict meaning were given to the words "towing gear" in the conditions by holding that they describe merely the actual towing gear itself, and not the rivets or attachments between the gear and the bulkhead. This is the meaning the defendants themselves have given to the words. They persisted in the correspondence that "all the towing gear" was lost overboard. The rivets were not so lost. The defendants knew they had remained in the bulkhead casing. If this be the right meaning, the defect, which caused the accident, is not within the words of the conditions at all.

As to the counter-claim, it is based upon an alleged agreement by the plaintiffs to indemnify the defendants against any damages. No such agreement was established. Indeed, no evidence at all was given to support the counter-claim, either in law or in fact.

Judgment will accordingly be entered for the plaintiffs on the claim and counter-claim, with costs, and there will be the usual reference on the claim.

Solicitors for plaintiffs: *Lightbound, Owen & MacIver, Liverpool.*
Solicitors for defendants: *Hill, Dickinson & Co., Liverpool.*

(1) (1887) 12 P. D. 187.

(2) [1903] 2 K. B. 378.

T. L. M.

1910
Dec. 5.

SIRRELL *v.* SIRRELL.

Practice — Security for Costs — Order of Justices — Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39)—*Husband's Appeal—Order for Security—Stay.*

A husband having appealed from an order obtained by his wife under the Summary Jurisdiction (Married Women) Act, 1895, application for security for the wife's costs was made to a judge in chambers supported by an affidavit stating that he had no property to answer any order for costs and also stating that the wife had no means of her own. An order was made that the husband (appellant) should pay into Court or give security for the costs of his wife (respondent on the appeal), and the hearing of the appeal was stayed meanwhile.

Application for security for costs of wife (respondent on an appeal from justices).

On October 25, 1910, the wife obtained an order from justices of Staffordshire, whereby her husband was adjudged to have deserted her, and she was granted a separation, and the legal custody of the child of the marriage, aged eight years, was given to her, and the husband was ordered to pay to the wife 10*s.* weekly, and he was also ordered to pay certain costs.

On November 3, 1910, notice of appeal from the whole of the said order was served on the wife's solicitors, and the hearing of the appeal was fixed for December 6, 1910, the day appointed for the sitting of the Divisional Court.

On December 1, 1910, the wife's solicitors issued a summons in the Probate Registry, returnable on December 2, 1910, for security for the wife's costs of the appeal. At the hearing before the registrar the husband's solicitor contended that the procedure was wrong, and that the application should have been made by motion to the Divisional Court. The registrar upheld this contention, stating at the same time that he had no power to grant a stay, but he adjourned the summons to the judge in chambers.

An affidavit of the wife, sworn on November 30, was filed in support of the application, which was that the husband should shew cause why he should not pay into Court or give security for the sum of 25*l.* or such other sum as might be considered sufficient to secure the costs of the wife (respondent on the

appeal); and that the hearing of the appeal might be postponed until seven days after such sum had been paid into Court or security given. In her said affidavit the wife stated, inter alia, that the husband was in lodgings with his father, and had no property or effects whatsoever, and that she (the wife) had no separate estate or means whatsoever.

On December 5 the matter came on before Bargrave Deane J. in chambers. The wife was again represented by a solicitor, and *Frampton* then appeared as counsel for the husband. The learned judge expressed the view that it was a matter for the Divisional Court, but said he would speak to the President (Sir Samuel Evans) as to constituting a Divisional Court to deal with it.

Later in the day,

BARGRAVE DEANE J. (in Court) said that he had seen the President, who did not think it necessary for them to sit as a Divisional Court, but agreed with him that, in view of the wife's affidavit and the statement of the wife's solicitor to the effect that counsel could not be briefed on the hearing of the appeal unless security were given, the appellant (husband) must be ordered to pay into Court 15*l.* or give security to the satisfaction of the registrar in the penal sum of 30*l.*, and that the hearing of the appeal must in the meantime be stayed.

Solicitors for the wife: *Dennison, Horne & Co., Agents for G. T. S. Plant, Dudley.*

Solicitors for the husband: *Murr, Rusby & Archer, Agents for Sharpe & Darby, West Bromwich.*

H. D. G.

1910

THE BIEN.

July 28, 29, 30; *Oct.* 12; *Nov.* 2.

Admiralty — Ship — Navigable River — Damage to Oyster Beds — Liability of Conservancy Board for Negligent Act of Harbour-master — Non-liability of Owner of Vessel — Continuing Authority.

The plaintiff, lessee of an oyster bed, brought an action against the conservators of the river Medway to recover the damage sustained by him owing to their harbour-master having placed, and kept for the purpose of repair, a brig which had foundered in the fairway, on the land comprised in the fishery, and the owner of the brig was added as a defendant, the plaintiff alleging that he was a party to the wrongful act of the harbour-master:—

Held, that the harbour-master had notice of the existence of the fishery, and in selecting that place, without necessity, he was guilty of negligence for which the defendant conservators were liable, as they could not ignore their lease and rely upon their powers to remove sunken vessels; but that the defendant owner of the brig, although he had notice of the oyster bed, was not liable for the further damage occasioned by keeping the vessel there for the purpose of repair, as he acted in pursuance of the directions, and under the continuing authority, of the harbour-master, for whose further negligence the conservators were liable.

Action of damage to oyster beds.

The plaintiff was Frank Raycraft, fishmonger, of Chatham, in the county of Kent, lessee of certain oyster beds at Sleede Ooze in Long Reach of the river Medway.

The defendants were the conservators of the river Medway, and Franck Rijsdijk, of Upnor, near Rochester, shipbreaker and owner of the Norwegian brig *Bien*.

The plaintiff, in the first instance, sued the conservators only, but subsequently added the other defendant, and, by his amended statement of claim, the plaintiff alleged that in September, 1909, the brig *Bien* foundered in the fairway of the river Medway below Sleede Ouze; that the brig was raised under the direction and superintendence of the defendants the conservators of the river Medway, or their servants, and by their orders was moved to and permitted to ground on the plaintiff's oyster beds, which were thereby damaged; that the defendant conservators, or their servants, were guilty of negligence in that they knew or ought to have known the position of the plaintiff's oyster

beds, and, having such knowledge, they ought not to have ordered the *Bien* to be moved into a position in which she was certain to damage the oyster beds when she took the ground. Alternatively the plaintiff alleged that the defendant conservators trespassed on the oyster beds and caused the damage complained of. The plaintiff further alleged that the defendant conservators knew or ought to have known that the *Bien* would have to be repaired before she could be removed from the position in which she was placed by their orders, that they also knew or ought to have known that she would do further damage to the oyster beds as she moved with the tide, and that further damage would be occasioned to the oyster beds in doing the repairs, and that this damage was the direct and natural consequence of the defendants' negligence and/or trespass.

The plaintiff further, and in the alternative, alleged that the defendant Franck Rijsdijk, as owner of the *Bien*, employed the defendant conservators to raise and remove the vessel, and by himself and his servants conducted and assisted in the raising and removal of the vessel, and failed to take necessary or reasonable precautions to prevent the vessel from grounding on the plaintiff's oyster beds in the course of such raising and removal, and negligently permitted her to ground thereon, whereby the plaintiff suffered damage, and after the *Bien* was first grounded thereon negligently moved her or permitted her to be moved on the oyster beds and carried out certain repairs to the vessel whilst lying thereon, whereby further damage was caused to the oyster beds. In the further alternative the plaintiff alleged that, in the circumstances above mentioned, the defendant Franck Rijsdijk, by himself or his servants or agents, trespassed on the oyster beds, whereby the plaintiff suffered damage. The plaintiff claimed judgment against the defendants jointly and severally for the amount of the damage.

The defendant conservators by their amended defence admitted that the brig foundered, and that she was raised and grounded by the orders of their harbour-master, and they admitted that they knew that she might have to be repaired before she could be removed, but they denied that the vessel was caused or permitted to ground on any oyster beds, or that they or their

1910

THE BIEN.

servants caused her so to do, and they denied that the plaintiff had suffered any damage. They further denied that the plaintiff was the lessee of the alleged oyster beds, or, if he was the lessee, that the lease was granted in accordance with the Rochester Oyster Fishery Acts, 1865 and 1867. They also alleged that the bed, soil, and shores of the river Medway, at the place where the brig was grounded, were vested in the defendant conservators under the Medway Conservancy Act, 1881, and that any lease granted was subject to their powers as conservators of the Medway.

The conservators further denied that they were guilty of the alleged or any negligence, or that they trespassed as alleged or at all, or that they caused any damage. They alleged that they did not know and had no means of knowing of the existence or position of the alleged oyster beds, that they were not sufficiently marked out, and that no proper, or any, notice of their existence or of their limits was given to them or their servants. The conservators further alleged that, even if they did know or ought to have known of the existence and position of the alleged oyster beds, and even if the plaintiff was the lessee or had suffered damage, (*a*) the place where the brig was grounded was the only place where she could be grounded for the purpose of necessary repair; (*b*) in so grounding her the defendant conservators were lawfully, necessarily, and reasonably acting in accordance with their statutory rights, duties, and obligations under the Medway Conservancy Act, 1881; and/or (*c*) the defendant conservators were lawfully and necessarily using, without negligence, the place where the brig grounded in the reasonable exercise of their lawful and ordinary right of navigation and/or grounding, and they navigated, conducted, and placed the brig there in the exercise of that right, which was anterior to and/or independent of any alleged right of the plaintiff. Finally the defendant conservators alleged that the brig was moved as soon as she reasonably could be from the position where she was grounded.

The defendant Franck Rijsdijk by his amended defence, so far as material, admitted that two tugs and twenty men were employed by him and were engaged on behalf of the owners in the raising and removal of the *Bien*, but he denied that he

was at any material time owner of the brig, and alleged that the vessel, after foundering, was necessarily and properly removed from the place where she lay obstructing the fairway, and was necessarily and properly placed on the ground near Teapot Hard as directed by the harbour-master, and that any lease of oyster beds was subject to the rights of the owners of the *Bien* in the river as a public navigable river.

By his joinder of issue on the defence of the defendant Franck Rijsdijk, the plaintiff alleged, alternatively, that if the defendant Franck Rijsdijk was not the owner of the *Bien* he nevertheless purported to act as owner, or as the representative of the owner, and took possession and control of the brig and employed the defendant conservators to raise and remove her, and by himself and others acting under his authority and directions committed the acts and was guilty of the negligence and trespass whereby the plaintiff suffered damage.

The following statement of the facts of the case, as found by the learned judge, is taken from the judgment:—

In the month of August, 1909, the Norwegian brig *Bien*, owned by one Andersen, and laden with a cargo of ice, got ashore on the Mouse at the entrance of the river Thames, when on a voyage from Norway to Rochester, in the river Medway. She was damaged, but was got off the Mouse and proceeded towards Rochester. On September 2, 1909, she got aground again in the river Medway to the north of the channel, at a spot agreed upon as about a cable's length north of the channel, and near Oakham Ness. There she filled with water and remained on the ground, and her cargo of ice melted away. Captain Richards, the harbour-master, an official of the conservators of the river Medway, received information about her on September 10, went down to inspect her, and gave notice to her owner, Andersen, to have her removed, but Andersen did nothing in the matter. On September 22 Captain Richards introduced the master of the *Bien* to one Rijsdijk, a shipbreaker, with the result that on the following day Rijsdijk bought the vessel and became her owner, and on that day, September 23, Captain Richards served Rijsdijk, as her new owner, with a notice to remove her. Rijsdijk took steps to obey the notice—procured a tug, lighters, and pumps—

1910

THE BIEN.

and on September 27 all was ready for her removal. Captain Richards attended in his launch, which also had a pump on board, and pumping commenced at low water, the intention being to tow her, when she was freed from some of the water in her and afloat, to Upnor for repairs. She was cleared sufficiently to get her off the ground as the tide flowed, and she was towed, the pumps still going, for about a mile towards Rochester, along the shallow water north of the channel, smelling the ground as she went. The harbour-master was in charge of the operations, Rijsdijk obeying his orders, and, finding her a difficult tow owing to her instability through the absence of any cargo, the harbour-master determined to put her ashore above low water mark at a place called Teapot Hard, on the north shore. She was eventually, about an hour before high water, put ashore there on a bed of mud between two hards, which comprise what is called Teapot Hard. She was placed 150 yards above low water mark, bow on, with an anchor out ahead and one astern. The harbour-master then gave up charge to Rijsdijk and left, intending that necessary repairs should be done there to enable her to be taken up to Rochester. She remained there from September 27 till November 11, during which time as the tide rose and fell she on several occasions shifted her berth, and it is not disputed that a considerable area of the foreshore was broken and disturbed by her during that time. On November 11, having been sufficiently repaired at Teapot Hard, she was taken up to Rochester.

1910. July 28, 29, 30. *Laing, K.C.*, and *Dawson Miller*, for the plaintiff, Raycraft, lessee of the oyster beds.

Aspinall, K.C., and *John B. Aspinall*, for the defendant conservators of the river Medway.

Bailhache, K.C., and *D. C. Leck*, for the defendant Franck Rijsdijk.

The arguments of counsel sufficiently appear from the judgment. In addition to the statutes and cases there mentioned the following case was referred to: *The Swift*. (1)

Cur. adv. vult.

(1) [1901] P. 168, at p. 173.

1910

THE BIEN.

Oct. 12. BARGRAVE DEANE J. [After stating the facts, already set out, the learned judge proceeded:—] There is no doubt that Teapot Hard is situated in an ancient shellfish fishery well known as the Sleede Ooze Fishery, and belonging to the Oyster Fishery Corporation of Rochester, and that it had been leased by them to the plaintiff, Mr. Raycraft, for twenty-one years from June 24, 1909, at a rental of 50*l.* a year, the lease purporting to be granted by the chamberlain and three of the jury of the Rochester Oyster Fishery Corporation pursuant to the statute of 1865 (28 & 29 Vict. c. ccxxvii.), and other statutes in that behalf. The ground is described in the lease as all that piece or parcel of land covered with water (to ordinary high water mark) being part of the Ooze, commonly called or known as Sleede Ooze, in the river Medway, as an oyster fishery, or oyster ground, or oyster laying. It is not disputed that the *Bien* was placed upon a portion of the land comprised within that lease, and it is not disputed that the lessors had the right and title to grant that lease; and it is not disputed that the *Bien* did whilst so lying on that land from September 27 to November 11 break up and disturb the surface in the way complained of.

I need not refer to the history of the various fisheries in the river Medway, of which Sleede Ooze is only one. The Act referred to, of 1865, recites that "Time out of mind there hath been an oyster fishery in the river Medway and in many of the creeks and branches thereof," and proceeds to make regulations for the management of the fishery. This statute was a public statute and was followed by 30 Vict. c. lxxii. and 31 & 32 Vict. c. liii., which confirmed the original statutes.

This action was brought by Mr. Raycraft against the conservators of the river Medway to recover damages for the injury done to the Sleede Ooze fishery through the conduct of Captain Richards, their servant, in placing the *Bien* on the land comprised in that fishery, and Mr. Rijsdijk was subsequently added as a defendant as having been a party to the wrongful act of Captain Richards.

The conservators do not dispute that Captain Richards was their servant and acted as such in what he did. Indeed, they

1910

THE BIEN.

Bargrave Deane J.

could not dispute it, bearing in mind the Medway Conservancy Act, 1881, under which he was appointed.

Their defence formally denies the plaintiff's lease; that the place was an oyster fishery ; that the plaintiff has suffered any damage ; and admits that they knew the *Bien* would have to be repaired before she was removed from Teapot Hard. But the real issues raised by them are as to their rights under their Act, as to their knowledge of the existence of the fishery, and particularly as to whether, in the circumstances, Captain Richards, in the exercise of his duty, was guilty of any negligence, and could have done differently from what he did.

Mr. Rijsdijk by his original defence admitted that he purchased the *Bien* after she foundered, but by his amended defence he denied that he was owner at any material time. He repeats the defence of the conservators as to their statutory rights, admits that he removed the *Bien* and placed her on Teapot Hard, but says he did it by direction of the harbour-master, denies negligence or trespass, denies knowledge of oyster beds, and says that the *Bien* was repaired and removed as soon as possible after the grounding on Teapot Hard.

The trial lasted over two days, and a considerable body of evidence was called by the plaintiff and the conservators, but no evidence was called in support of the defence of Mr. Rijsdijk, though his counsel stated that he was not in fact the purchaser of the *Bien*, but only acted on behalf of the company for whom he purchased her. As to this, I have already pointed out that in his defence, as originally delivered, he admits that he purchased her, and Captain Richards in his evidence before me said that he introduced Rijsdijk to the captain as a purchaser, and subsequently served him with notice as the owner. There is no evidence to make me doubt that Rijsdijk in fact became her owner, and was her owner at the time in question.

Let me first deal with the question as to the legal positions of the plaintiff and the conservators as regards this land where the *Bien* was placed near Teapot Hard. It is undoubtedly and undeniably a fishery, vested by statute in the persons who leased it to the plaintiff, and I am satisfied that it was a fishery

in fact as well as in name. No question has been raised as to its producing shellfish, such as mussels, winkles, and cockles, but it is declared that no oysters did or do grow there, and that the plaintiff has both spoken and acted dishonestly in attempting to make out that oysters grew there. As against this allegation it was proved before me that it had been leased and cultivated as an oyster fishery for many years, and various leases were put in, covering nearly forty years past, and witnesses were called who satisfied me that the plaintiff's account was true, and the attempt on the part of the defendants to discredit him and his fishery failed. The witness whose evidence was to my mind conclusive on this point was called by the defendants, a Mr. Passby, who had been engaged in oyster culture all his life and had rented this particular fishery, Sleede Ooze, from the plaintiff's lessors for a period of twenty-eight years, and was the immediate predecessor of the plaintiff. He said that he had cultivated oysters there; that when he gave it up there was a large number of oysters there; that there was a great spat three years before he gave it up, and that it took three or four years for the spat to mature. It is true he threw doubt on whether there would be oysters at the spot where the *Bien* lay, but his evidence when he gave it did not satisfy me that the evidence of the plaintiff and his witnesses that there were in fact oysters there was untrustworthy, and the whole of the evidence satisfied me that in fact there were oysters, though to what extent I must leave the registrar and experts to ascertain if necessary.

The evidence of the expert witnesses established that oysters will not grow on mud, but that undisturbed mud gradually acquires a crust by the deposit on it of stones and other debris left by the tide, which is in time of such a character that oysters will lodge and breed upon it, so that in course of time a person can walk on it and gather the oysters; and witnesses were called whose evidence I accept that they themselves had gathered oysters on such a crust at and round the place where the *Bien* was placed on September 27. Such a witness was Henry King, who knew the Sleede Ooze fishery well, and had worked on it for Mr. Williamson and Mr. Passby, the predecessors in title of the plaintiff.

1910

THE BIEN.

Bargrave Deane J.

I am satisfied, and find as a fact, that there were oysters at and round the place where the *Bien* was placed, as well as other shellfish, and that these oysters and shellfish were damaged and destroyed by the *Bien* being placed there, and were further damaged and destroyed by reason of the *Bien* remaining there so long, shifting about and stirring up the mud, which was carried over and deposited on other ground for a considerable distance beyond the keel marks actually made by the *Bien*.

The next question is who is responsible for placing the *Bien* on the land in question? The answer is easy, as Captain Richards admits that he selected Teapot Hard. He said in cross-examination, "I selected the spot near Teapot Hard as the most suitable spot"; and he further said, "If I had known it was an oyster fishery I should not have put her there," which shews that it was not a matter of necessity to put her there. As a witness he was perfectly candid, and accepted the responsibility for choosing the place, although he says that it was in fact done by the other defendant and the tug and men working with him. It is true that he went on to say that he "could not have put her on Hoo Flat as she would have sunk in the mud"; but he, in fact, did put her in the mud according to his own evidence, and he relies on that fact in the part of the case where he says there could be no oysters where he placed her, as it was all mud. I am of opinion, and the Elder Brethren agree with me, that she could have been placed on Hoo Flat, which is less than two cable lengths higher up the river than Teapot Hard, and that she could have been repaired there quite as easily as she was repaired where she was placed. The truth is that Captain Richards either had forgotten all about this Sleede Ooze fishery or had never realized that it existed. It is pleaded that he had no notice of this fishery. That is contrary to the fact. He was appointed harbour-master in 1895, fifteen years before these events. One witness called for the plaintiff was Mr. Apsley Kinnette, the town clerk of Rochester, who is also the registrar of the Oyster Fishery Corporation, and he stated in evidence that in 1896 he prepared a plan for the harbour-master shewing all the fisheries of the corporation, which was kept in the harbour-master's office, and upon notice was produced in Court before me. It shews the

Sleede Ooze fishery clearly defined and coloured on the plan. It was further sworn by the plaintiff's witnesses that a watch-boat was moored off this fishery with a man living in it, and that wands and notice boards were placed giving notice of it. There is much conflict of evidence about this, and although there was no dispute about the existence of the watch-boat, which Captain Richards must have seen every day that he passed in his launch up or down the river, I do not place so much reliance upon these demarcations of the fishery as upon the plan with which Captain Richards had been supplied, and which he must have had constantly under his observation. I am of opinion that Captain Richards had special notice given him of this fishery, and that the defence fails in that respect. What is the necessary consequence? It is that I must and do find that Captain Richards, without any necessity compelling him to do so, placed the *Bien* on land which he must or ought to have known was an oyster fishery, when he could easily have taken her on the flood tide 400 yards higher up the river and placed her on Hoo Flat, which was not a fishery, and has been described as "no man's" land, and where he would have occasioned no damage to any one. I find that this was an act of negligence on his part which occasioned the damage which the plaintiff complains of. Although the amount of the damage is not for me to determine, still I am satisfied that some damage was done.

Next as to the responsibility of the defendant Rijsdijk. He was with Captain Richards when all the moving of the *Bien* to Teapot Hard was in progress, and, in fact, moved her, but I am satisfied that the placing of her where she was placed was done on the sole responsibility and direction of Captain Richards, and that Rijsdijk only acted at the time pursuant to those directions. But Captain Richards says, and it is not disputed, that having seen her placed on the ground, and moored, he left her and gave no further orders about her. From that time Rijsdijk was in possession of her. She was placed there about 10 P.M. on September 27, and on the following morning notice was given to those on board—Rijsdijk being one—by King, the watchman, that she was on the plaintiff's fishery. The watchman was referred to the conservators, and Rijsdijk took no steps to move the vessel, and kept

BIBL. LONDIN UNIV.

1910

THE BIEN.

Bargrave Deane J.

her there until November 11, and it is needless to say that while she was being repaired at that place, with a lighter and men and materials, much further damage was done; and the question is who is responsible for that further damage.

This brings me to the law and decided cases. First, it is undoubted that the Medway at the material part, namely, from the sea to Rochester, is a navigable river, and that previous to the Medway Conservancy Act, 1881 (44 & 45 Vict. c. 174), the mayor, aldermen, and citizens of Rochester were, or claimed to be, owners of the bed, soil, and foreshore of that river, and by s. 75 of that Act all the estate, right, title, and interest of the corporation in the bed and soil and shores of the river became and were transferred to and were vested in the conservators, brought into existence under that Act as the Medway Board of Conservancy. Sect. 114 gave authority to the harbour-master appointed by the board to regulate the time and manner in which any vessel shall enter into, go out of, or lie in the river, and the position, mooring or unmooring, placing or removing any vessel within the same. Sect. 120 gave the harbour-master the usual full authority as regards the removal or destruction of vessels sunk or stranded in the river. But by s. 153 it was enacted that nothing in this Act shall alter, abridge, or affect the provisions of the Act 2 Geo. 2, c. 19, or of the Rochester Fishery Act, 1865, or of the Rochester Fishery Act, 1867, or the Medway Regulation Continuance Act, 1868, or any estate, right, title, interest, power or privilege acquired thereunder or saved thereby.

The conservators in this case plead that the bed, soil, and shores of the river are vested in them. That is true. They plead further that any lease granted is subject to their powers. I do not think so if they mean that they may ignore the lease at their pleasure. I am of opinion that they are bound to recognize these fishery leases and abstain from ignoring them, and do their utmost in the exercise of their powers to avoid trespassing upon or injuring these fishery grounds; and if they or their servants by an act of negligence do injury, then they are liable to make good the damage resulting from such negligence. It is not suggested in this case that the *Bien* was placed on this

fishery ground in the ordinary course of navigation or by any force majeure which put it out of the power of the harbour-master to avoid the injury he occasioned. His own evidence negatives that, as he admits that he selected the spot. It is not a case of public right, so as to bring the case within *Mayor of Colchester* v. *Brooke* (1) or *Gann* v. *Free Fishers of Whitstable* (2), but it is a case where a public servant, having a statutory right to move a ship, so negligently conducts himself as to cause damage to the property of an individual towards whom, by the same statute under which he exercises his powers, he is bound to exercise every caution and diligence, and not, as in this case, to wilfully ignore the notice he had received of the existence of this fishery, and intentionally to place a ship there in preference to placing her a few hundred yards further on, where there was no fishery to injure.

The result is that I find that the plaintiff has established his case against the conservators. But this does not conclude the matter. There is still the claim against Mr. Rijsdijk. As to this I am in a difficulty owing to that gentleman not having been called and no other evidence having been offered on his behalf. As I have said, Captain Richards left the ship on the night of September 27, and was not there on the morning of the 28th, when the watchman informed Rijsdijk that his ship was on the fishery ground and was doing damage. There is no statement by Mr. Rijsdijk that then or thereafter he was acting under the orders of Captain Richards. Mr. Rijsdijk has not in any way explained why, when he had notice that his ship was doing damage to this fishery ground, he did not take immediate steps to remove her the short distance necessary to abate that damage as soon as possible. Either he or Captain Richards is, or both are, responsible for this further damage. No evidence has been offered to the Court to shew that it was impossible to shift the *Bien* on the next flood tide some 400 yards up river on to Hoo Flat, and considering that, on the night of the 27th, she was moved a mile on the flood, there is no evidence offered why she could not have been moved that short distance further on the 28th or the 29th.

(1) (1845) 7 Q. B. 339. (2) (1864) 11 H. L. C. 192.

1910

THE BIEN.

Bargrave Deane J.

This part of the case comes, according to the argument of counsel for the defendant Rijsdijk, within the judgment of Sir J. Hannen in *The Octavia Stella.* (1) In that case the pilot who was in charge negligently placed a ship on an oyster fishery and was held to blame. The master, as soon as he found his ship was in a position where she was doing damage to an oyster fishery, did everything in his power to remove his ship so as to minimize the damage as much as possible. Sir J. Hannen in his judgment says: "In this case we must have regard to the fact that the captain by no negligence of his own, but by the negligence of somebody else for whose acts he was not responsible, was brought into this position, and he therefore had only the duty imposed upon him of getting out of that position by reasonable efforts. His duty was to extricate himself from the position in which he was by the ordinary means of navigation, and he was not bound to take extraordinary measures, not in the nature of ordinary navigation, but in the nature of extra exertions for the purpose of preventing the damage to the oysters." Unfortunately, however, the facts and positions of the two defendants do not correspond with the facts of *The Octavia Stella* (1) and the positions of pilot and master in that case. The position of Captain Richards as the harbour-master and officer of the Medway Conservancy Board carried with it a much greater and more enduring authority than that of a pilot, whereas the position of Mr. Rijsdijk in the circumstances was far short of that of the master in *The Octavia Stella.* (1) The *Bien* was placed on Teapot Hard by the authority of the harbour-master, and undoubtedly with the intention that she should remain and be repaired there, and I have no doubt, although Mr. Rijsdijk has not been called to say so, that that object and intention was conveyed to Mr. Rijsdijk by the harbour-master, because, when warned by the watchman that the *Bien* was on this oyster ground, the former at once referred the watchman to the conservators as the persons by whose authority he was there. The harbour-master in due course appeared on the scene, and there was an interview at the vessel between the plaintiff, the

(1) (1887) 6 Asp. M. L. C. 182.

harbour-master, and Rijsdijk. The latter at that interview suggested first that there were no oysters there, and then, when the plaintiff picked up some and shewed them, deliberately imputed to the plaintiff that he had fraudulently placed them there. In my opinion there is no evidence in fact in support of this imputation, and I regret that it was made, and still more do I regret that the imputation was renewed in the course of the trial. But apart from this conduct of Rijsdijk's at this interview, it is quite clear from the evidence that, so far as the position of the ship was concerned, and of her being repaired where she was, the harbour-master was at that time looked to as the person responsible, that it was made clear to his mind then, if not before, that he had placed the vessel on the ground forming part of the oyster fishery known as Sleede Ooze, and that a complaint was made to him that his act in placing her there had caused and was causing damage, and that it was his duty then to have had her moved from there. On the other hand, Rijsdijk, in my judgment, could not properly have moved and placed her elsewhere without the harbour-master's authority, which was a continuing authority, and, further, Rijsdijk could not properly (and here I am assisted by the strongly-expressed opinion of the Elder Brethren) have taken upon himself, without the advice and direction of the harbour-master, the responsibility of attempting to move this wrecked vessel, full of water, and without stability, from the place where she was. I am clearly of opinion that the responsibility of the harbour-master was a continuing responsibility, and that Rijsdijk's position as owner was throughout subordinate to the harbour-master's authority.

For these reasons I am of opinion that the plaintiff is entitled to judgment in this action, with costs against the Medway Conservancy Board, and that Rijsdijk is entitled to judgment, with such costs as may be found due on taxation, and to be paid by the conservators.

As to the damages, there must be a reference if the parties desire it, but, as I have heard the whole of the facts, I am willing (to save the expense of a reference) to say what sum I think would be a reasonable compensation to the plaintiff, in the

1910

THE BIEN.

Bargrave Deane J.

circumstances, if both parties are willing that I should do so. (1)

Solicitor for the plaintiff, Raycraft: *W. A. E. Headley, for Norman & Stigant, Chatham.*

Solicitors for the defendants the Medway Conservators: *Dollman & Pritchard, for Hayward, Smith & Challis, Rochester.*

Solicitor for the defendant Franck Rijsdijk: *Robert Greening.*

T. L. M.

C. A.

1910

Nov. 3.

[IN THE COURT OF APPEAL.]

THE PORTSMOUTH.

Admiralty—Ship—Bill of Lading—Incorporation of Conditions of Charter Party—Demurrage—Arbitration Clause.

Goods were shipped under a bill of lading by which they were deliverable to the shipper or to his assigns, "he or they paying freight for the said goods with other conditions as per charter party," and in the margin was written in ink "Deck load at shipper's risk and all other terms and conditions and exceptions of charter to be as per charter party including negligence clause."

The charter party provided that the cargo should be discharged by the steamer at port of destination, in the usual manner, with customary steamer despatch, according to the custom of the port, "but if, through any fault of the merchant or charterer, the steamer is longer detained, demurrage to be paid at the rate of twenty-five pounds per day," and "Any dispute or claim arising out of any of the conditions of this charter party shall be adjusted at port where it occurs, and same shall be settled by arbitration."

The shipowner commenced an action in a county court against the holder for value of the bill of lading for demurrage alleged to have been incurred at the port of discharge. The county court judge stayed all proceedings in the action on the ground that the arbitration clause in the charter party was incorporated in the bill of lading, and a Divisional Court, [1910] P. 293, affirmed the order:—

Held by the Court of Appeal, that the order staying proceedings must be discharged, as the arbitration clause in the charter party did not apply to the dispute between the shipowner and the holder of the bill of lading.

Hamilton v. *Mackie*, (1889) 5 Times L. R. 677, followed.

APPEAL by plaintiffs, the Portsea Steamship Company, Limited, of Cardiff, shipowners, from a decision of a Divisional Court,

(1) On November 2, Bargrave Deane J., by consent, assessed the damage sustained by the plaintiff at 155*l.*

sitting in admiralty (1), affirming an order of a county court judge, staying their action for demurrage against the defendants, T. W. Thomas & Co., Limited, timber merchants, of Swansea, on the ground that the matter in dispute was within a submission to arbitration contained in the charter party, and incorporated by reference in the bill of lading under which the goods were carried.

On April 26, 1910, the appellants, as owners of the steamship *Portsmouth*, commenced an action in the Cardiff County Court (admiralty jurisdiction) against the respondents, the holders of the bill of lading and consignees of cargo, for 200*l*. "eight days' demurrage to the steamship *Portsmouth* at 25*l*. a day under bill of lading dated November 29, 1909."

The bill of lading was in respect of the carriage of a cargo of timber from Parrsboro Roads, N.S., to Swansea, shipped by W. Malcolm Mackay, and deliverable to the shipper or to his assigns, "he or they paying freight for the said goods with other conditions as per charter party," and in the margin was written in ink "Deck load at shipper's risk and all other terms and conditions and exceptions of charter to be as per charter party including negligence clause."

The charter party, dated January 14, 1909, and signed in Liverpool by the respective agents of the shipowners and of the charterers, provided, inter alia, for discharge of the timber by the steamer at port of destination in the usual manner, with customary steamer despatch, according to the custom of the port, "but if, through any fault of the merchant or charterer, the steamer is longer detained, demurrage to be paid at the rate of twenty-five pounds per day," and also contained the following clause: "Any dispute or claim arising out of any of the conditions of this charter party shall be adjusted at port where it occurs, and same shall be settled by arbitration."

On May 2, 1910, the respondents (defendants), relying upon the reference to arbitration contained in the charter party, entered an appearance to the action under protest, and applied, under s. 4 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), to stay proceedings.

(1) [1910] P. 293.

C. A. 1910

THE PORTSMOUTH.

On May 5, the learned county court judge made an order staying all proceedings in the action between the plaintiffs and the defendants, with costs against the plaintiffs, on the ground that the arbitration clause in the charter party was incorporated in the bill of lading, and in the course of his judgment said that the question arose under the charter party, "and it is to the charter party you must look to see what demurrage is due, and for what reasons the demurrage became due, and what the liabilities of the persons charged with it are."

On July 19, the plaintiffs appealed to a Divisional Court, sitting in admiralty, on the ground that the learned county court judge was wrong in law (*a*) in holding that the arbitration clause contained in the charter party was incorporated into the bill of lading, (*b*) in holding that the plaintiffs were not entitled to proceed with their action against the defendants for demurrage incurred in the discharge of the cargo, but were bound to resort to arbitration, and (*c*) in holding that the provisions of the Arbitration Act, 1889, s. 4, applied so as to bar the plaintiffs from pursuing their remedy for such demurrage by action at law.

On July 27, the appeal was dismissed with costs by the Divisional Court on the ground that the arbitration clause applied to the claim in the action.

The President (Sir Samuel Evans), in the course of his judgment (1), said: "The bill of lading does not fix the rate of demurrage, but it contains the usual provision 'he or they paying freight for the said goods with other conditions as per charter party,' and in the margin, 'All other terms and conditions and exceptions of charter to be as per charter party including negligence clause.' The rate of demurrage is fixed by the charter party as follows: 'But if, through any fault of the merchant or charterer, the steamer is longer detained, demurrage to be paid at the rate of 25*l.* per day.' The same clause contains various terms, conditions, and exceptions which would require to be considered in determining whether any, and, if so, how many days, demurrage was payable. The arbitration clause in the charter party reads thus: 'Any dispute or claim arising out of any of the

(1) Set out in full in [1910] P. 293, at p. 295.

conditions of this charter party shall be adjusted at port where it occurs, and same shall be settled by arbitration.'

"We were referred to various cases and text-books, all of which I have carefully considered. The principle which has been generally accepted in all the cases is stated by Willes J. in *Russell* v. *Niemann* (1): '(The question) depends upon whether the words "and other conditions as per charter party" include all the stipulations and conditions contained in that instrument, or whether they are not limited to conditions ejusdem generis with that previously mentioned, viz., payment of freight—conditions to be performed by the receiver of the goods. It is a mere question of language and construction, and we think it enough to say that the latter is the construction which we put upon these words.' These words were expanded or explained by Lord Blackburn in an unreported case of *Taylor* v. *Perrin* in the House of Lords, in the following passage:—'The case which has been referred to—*Russell* v. *Niemann* (2)—in which Willes J. gave judgment, as it appears to me perfectly correctly decided that the reference to the charter party is meant to bring in those conditions which would apply to the person who has taken the bill of lading, and in taking delivery of the cargo, such as payment of demurrage, the payment of freight, the manner of paying, and so on; but is by no means to be taken to incorporate all the conditions of the charter party' (quoted per Lopes L.J. in *Serraino* v. *Campbell* (3)).

"It appears to me that if the words 'the ascertainment of the amount of the demurrage or freight' were inserted after the word 'freight' in the above passage it would be equally accurate; and, if so, it would apply directly to the present case. Lord Esher has said that the words mean that you must read the conditions of the charter party verbatim into the bill of lading, as though they were printed in extenso, and then disregard such as were inconsistent with the bill of lading. Mathew L.J., in *East Yorkshire Steamship Co.* v. *Hancock* (4), states the effect of the decisions thus: 'The only provisions of the charter party which

(1) (1864) 17 C. B. (N.S.) 163, at p. 177.
(2) 17 C. B. (N.S.) 163.
(3) [1891] 1 Q. B. 283, at p. 295.
(4) (1900) 5 Com. Cas. 266, at p. 268.

C. A. 1910

THE PORTSMOUTH.

are not incorporated into the bill of lading are those which are not clearly relevant to conditions which have to be performed by the consignee on the arrival of the ship.'

"We were pressed by counsel for the appellants with the decision in *Hamilton* v. *Mackie* (1), and, if the facts were the same, that case would, of course, bind us. It related to an arbitration clause. The case is very shortly reported. I have done my best to obtain a copy of the record, and the documents, but without success. It appears from the short report that 'the action was brought for the balance of the bill of lading freight'; that the charter party provided that 'all disputes under this charter shall be referred to arbitration'; and that on the bill of lading were stamped the words 'all other terms and conditions as per charter party.' The Master of the Rolls said it was clear that the condition as to arbitration did not refer to disputes arising under the bill of lading, but to disputes arising under the charter party. Lord Collins explains that decision in *Temperley Steam Shipping Co.* v. *Smyth* (2) thus: 'He (Lord Esher) treats the dispute in that case as arising *exclusively* under the bill of lading, and *not* under the charter party, and therefore as not covered by the clause which related to disputes under the charter *only*.' The italics are mine. I agree with the late Judge Carver that the context must in each case be looked at (see par. 160, 5th ed. (1909) of Carriage of Goods by Sea). As was said by Willes J., it is a mere question of language and construction in each case.

"In this case the arbitration clause refers not to disputes under the charter party only, but to 'any dispute or claim arising out of any of the conditions' of the charter party. The action is brought for demurrage fixed by the charter party. How many days demurrage is payable, and in what circumstances it is recoverable, depends upon the terms and conditions of the demurrage clause in the charter party; in other words, the charter party must be referred to in order to ascertain the amount and the conditions of liability. The dispute or claim in this case arises out of those conditions, and accordingly is a dispute or claim coming literally and expressly within the arbitration

(1) 5 Times L. R. 677. (2) [1905] 2 K. B. 791, at p. 801.

clause. Suppose the words 'any dispute or claim arising out of any of the conditions of this clause shall be settled by arbitration' were added, so as to form part of the demurrage clause itself; I think it pretty clear that this claim would come within that provision. It cannot make any difference that the words form a separate clause by themselves."

Bargrave Deane J., in concluding his judgment(1), said: "In my opinion, apart from the question of law, which the President has dealt with, the facts are conclusive against the plaintiffs in respect of the matter being tried by arbitration. They admitted at one time that it was a matter which should be submitted to arbitration. Now, when it does not suit their purpose to agree to the arbitrator, they fall back upon the point of law which, as my Lord has pointed out, is against them. In my opinion, both on law and fact, the plaintiffs fail."

Nov. 3. *Bailhache*, *K.C.*, and *D. W. Carr* (*A. Parsons* with them), for the appellants (plaintiffs), the owners of the *Portsmouth*. The arbitration clause contained in the charter party does not apply to the claim of the plaintiffs for demurrage under the bill of lading, for the condition as to arbitration does not refer to disputes arising under the bill of lading, but to disputes arising under the charter party: see per Lord Esher M.R. in *Hamilton* v. *Mackie* (2), a case which is conclusively in favour of the appellants, and binding on this Court. The decision in that case was—in the words of the late Judge Carver (3)—that "a clause in the charter requiring disputes under it to be referred to arbitration had no application to the bill of lading, and was, therefore, not brought in." See also Scrutton on Charterparties and Bills of Lading, 6th ed. (1910), p. 52. The judgment of Lord Esher is set out and explained by Lord Collins in *Temperley Steam Shipping Co.* v. *Smyth* (4), where, after dealing with *Runciman* v. *Smyth* (5) and *Rodoconachi* v.

(1) Set out in full in [1910] P. 293, at p. 298.
(2) 5 Times L. R. 677.
(3) Carriage of Goods by Sea, 5th ed., par. 160.
(4) [1905] 2 K. B. 791, at p. 801.
(5) (1904) 20 Times L. R. 625.

C. A. 1910

THE PORTSMOUTH.

Milburn (1), that learned judge, on the question which is the binding contract, the charter party or the bill of lading, and on the authority of *Russell* v. *Niemann* (2), says, "in the case of the holder of the bill of lading, who is not the charterer, there is no presumption that he contracts in any terms but those of the bill of lading, and, if the bill of lading purports to import the charter party, the presumption is that it incorporates only those clauses which relate to the conditions to be performed by the receiver of the goods."

The President (Sir Samuel Evans), in his judgment, lays stress on the necessity of referring to the charter party in order to ascertain the rate of payment under the head of demurrage and the conditions of liability; but it is not material that the charter party must be referred to in order to ascertain these details, for that will not render an agreement to refer disputes between shipowner and charterer an agreement to refer disputes between shipowner and bill of lading holder.

Leslie Scott, K.C., and *Holman Gregory, K.C.*, for the respondents (defendants), holders for value of the bill of lading. The case of *Hamilton* v. *Mackie* (3) is very shortly reported, and some material facts have to be assumed, but the construction put by the Court upon the contract appears to have been that the condition "all disputes under this charter shall be referred to arbitration" did not refer to disputes under the bill of lading, but to disputes arising under the charter party, that is to say, it referred to disputes between the parties to the contract contained in the charter party, and had no application to a dispute which arose under the bill of lading. In this case the language employed is not quite the same and does not indicate any intention to limit the condition as to arbitration to disputes arising under the charter party only. The words are "any dispute or claim arising out of any of the conditions of this charter party," and it is submitted that the true rule of construction to be applied is that stated by Kay L.J. in *Serraino* v. *Campbell* (4), where—after referring to *Hamilton* v. *Mackie* (3)—the learned

(1) (1886) 17 Q. B. D. 316; 18 Q. B. D. 67.

(2) 17 C. B. (N.S.) 163.

(3) 5 Times L. R. 677.

(4) [1891] 1 Q. B. 283, at p. 301.

judge says "in each case the Court must decide from the context, and such surrounding circumstances as it is bound to regard, which clauses of the charter party are to be incorporated into the bill of lading by such words as 'all other conditions as per charter party.'"

In the present case there seems good reason why the parties concerned would deem it desirable to provide for arbitration as between the shipowner and the bill of lading holder, for it is to be noted that, under the cesser clause, the liability of the charterer would have ceased before any liability for demurrage at the port of discharge could arise. As to the effect of the cesser clause, see *Restitution Steamship Co.* v. *Pirie & Co.* (1) It is also clear that the appellants read the words in the bill of lading "all other terms and conditions and exceptions of charter" as including the arbitration clause, for the negotiations commenced by them with a view to arbitration were only broken off when a disagreement arose as to the selection of the arbitrator. It is also pointed out by the President (Sir Samuel Evans), in his judgment, that the dispute or claim arose out of the conditions of the demurrage clause in the charter party and "accordingly is a dispute or claim coming literally and expressly within the arbitration clause."

The case of *Temperley Steam Shipping Co.* v. *Smyth* (2), cited by the appellants, arose out of a dispute between the shipowner and the charterer, and is no guide as to the mode in which the present dispute is to be determined; but the case is important owing to *Runciman* v. *Smyth* (3)—which was decided on the authority of *Hamilton* v. *Mackie* (4)—being there overruled, and because the explanation given by Lord Collins of the decision in the latter case seems somewhat in the nature of criticism. [Reference was made to the cases of *Diederichsen* v. *Farquharson* (5) and *Shamrock Steamship Co.* v. *Storey & Co.* (6)]

VAUGHAN WILLIAMS L.J. I think this appeal must be allowed. The action was brought by the owners of the ship for the purpose

(1) (1889) 7 Asp. M. L. C. 11, note.
(2) [1905] 2 K. B. 791.
(3) 20 Times L. R. 625.
(4) 5 Times L. R. 677.
(5) [1898] 1 Q. B. 150.
(6) (1899) 8 Asp. M. L. C. 590.

C. A. 1910

THE PORTSMOUTH.

Vaughan Williams L.J.

of recovering demurrage, and thereupon the defendants, who were the bill of lading holders, thought that it was a case which was governed by the arbitration clause in the charter party. They applied, therefore, for a stay of the proceedings in the action, and that stay was granted. The President and Bargrave Deane J., when the matter came before them, affirmed the decision of the county court judge, and considered that the case was one which was governed by the arbitration clause in the charter party.

The question we have to decide is whether or not this arbitration clause was binding upon the bill of lading holder. I may as well say a word or two about the charter party and the bill of lading. We have had both brought before us. The charter party provides first for the ship having a lien upon the cargo for freight and demurrage, and then there is a demurrage clause which begins with the statement that the cargo is to be furnished free alongside at the port of loading at merchant's risk and expense, and then makes reference to the discharge at port of destination, and continues, "but if through any fault of the merchant or charterer, the steamer is longer detained, demurrage to be paid at the rate of twenty-five pounds per day." Then there is the arbitration clause, which is almost at the end of the charter party. It says, "Any dispute or claim arising out of any of the conditions of this charter party shall be adjusted at port where it occurs, and same shall be settled by arbitration."

I think I have now read enough of the provisions of the charter party, and it is not in dispute here that as between the ship and the charterer this is a case where the arbitration clause would apply —where the tribunal to dispose of any disputes or claims is fixed by contract to the exclusion of the jurisdiction of the ordinary courts of law. That being so, one has now to ask oneself how far this clause is applicable in the case of rights and liabilities arising under the bill of lading.

Now, the bill of lading runs, so far as material, thus: "he or they paying freight for the said goods with other conditions as per charter party." At that point I take it one has to read in certain words which appear in the margin, and they say, "Deck load at shipper's risk and all other terms and conditions

and exceptions of charter to be as per charter party including negligence cause." When I ask myself how far, according to the terms of this bill of lading, the relations of the ship and the bill of lading holder are governed by the arbitration clause in the charter party—which of course would be operative in a dispute between the ship and the charterer—I cannot help at once saying that so far as the literal meaning of the words is concerned they are not applicable to this case. But then it is said you should not take the literal meaning of the words, but see whether there is a dispute which, although it does not arise out of any of the conditions of the charter party as such, does arise out of the conditions of the bill of lading which would incorporate the clauses of the charter party. I therefore look at the words which I find in the bill of lading itself, and it seems to me to be obvious that the parties did not mean or assume that every clause in the charter party which was applicable as between ship and charterer was to be incorporated and used as part and parcel of the bill of lading, so as to govern the relations between the ship and the bill of lading holder. I have come to the conclusion that these words in the bill of lading, which really are, to say the least of it, ambiguous, leave it open to question whether the words of the arbitration clause are to apply as between the ship and the holder of the bill of lading. I look at all the circumstances of the case, and although it is said that the clause must apply unless I can find something inconsistent with the clause, I do not think one need find anything that is expressly inconsistent.

In my opinion really the case which has been so much talked about to-day, of *Hamilton* v. *Mackie* (1), is conclusive of the matter, though I know it is said that that case may be read in two ways. The report, which is quite short, says: "The plaintiffs were the owners of the steamer *President Garfield*, and the action was brought for the balance of the bill of lading freight, the defendants being the consignees of the cargo and indorsees of the bill of lading. It was agreed by the charter party that any dispute that might arise under the charter was to be settled by arbitration at the port where the dispute arose. On the bill

(1) 5 Times L. R. 677.

C. A. 1910

THE PORTSMOUTH.

Vaughan Williams L.J.

of lading the words were stamped, 'All other terms and conditions as per charter party.' The judge at chambers stayed the action on the ground that the matter ought to have gone to arbitration, and the Divisional Court upheld his decision." The Court of Appeal allowed the appeal. The Master of the Rolls (Lord Esher), in delivering judgment, said "that the law on the subject had been laid down several times. Where there was in a bill of lading such a condition as this, 'all other conditions as per charter party,' it had been decided that the conditions of the charter party must be read verbatim into the bill of lading as though they were there printed in extenso. Then, if it was found that any of the conditions of the charter party, on being so read, were inconsistent with the bill of lading, they were insensible and must be disregarded. The bill of lading referred to the charter party, and therefore when the condition was read in, 'all disputes under this charter shall be referred to arbitration,' it was clear that that condition did not refer to disputes arising under the bill of lading, but to disputes arising under the charter party. The condition, therefore, was insensible, and had no application to the present dispute, which arose under the bill of lading."

In my opinion it is clear here, if you look at the charter party and then look at the bill of lading, that the condition which it is said is incorporated in the bill of lading does not refer to disputes arising under the bill of lading, but to disputes arising under the charter party. Under those circumstances, if the decision I have referred to is right, there is an end of the present case. It is said, however, that the provisions in this case are somewhat different. I do not agree. I think that the case of *Hamilton* v. *Mackie* (1), as long as it is unreversed, is binding upon us, and is conclusive of the case that we have before us.

I only wish to add here that, if you look at the decision in *Temperley Steam Shipping Co.* v. *Smyth* (2), it seems to me that the judgment of Lord Collins, then Master of the Rolls, and the judgment of the other member of the Court, did not in any way question the correctness of the decision in *Hamilton* v. *Mackie*. (1)

(1) 5 Times L. R. 677. (2) [1905] 2 K. B. 791.

C. A. 1910

THE PORTSMOUTH.

Vaughan Williams L.J.

On the contrary, they affirmed it. If you think that this case of *Hamilton* v. *Mackie* (1) was affirmed and that we are bound by it, the only question outstanding is what that case did. I have already said I find nothing in that case to differentiate it from the present case, and *Hamilton* v. *Mackie* (1) is a case which has been cited over and over again in cases before this Court. Among others, it was cited and dealt with in the case of *Serraino* v. *Campbell*. (2) Kay L.J. there said: "*Hamilton* v. *Mackie* (1) seems to have decided that these words of reference would not introduce into the bill of lading a clause for reference to arbitration of any dispute upon the charter party."

I consider that this clause in this bill of lading is a clause which refers to any dispute arising under the charter party and nothing else, and I do not think that the words in the bill of lading were introduced so as to make the arbitration clause applicable in the case of any dispute arising between the ship and the bill of lading holder.

In these circumstances, I think the appeal must be allowed. I do not say for a moment that the case is not one upon which a great deal may be said on both sides, and if, as has been intimated, the case goes to the House of Lords, I do not know what the ultimate decision may be, but, looking at it as the case stands at the present time, we must follow the decision in *Hamilton* v. *Mackie* (1), and I have already expressed my opinion of what that case decides.

BUCKLEY L.J. The question for determination is quite short. It is only as to the meaning, according to their true construction, of words in the charter party introduced by reference into the bill of lading. The words are "Any dispute or claim arising out of any of the conditions of this charter party shall be adjusted at port where it occurs, and same shall be settled by arbitration." The appellants contend that these words are equivalent to "any dispute or claim arising under this charter party." If that is their true meaning this case is concluded, so far as this Court is concerned, by *Hamilton* v. *Mackie*. (1) The respondents contend that the words are equivalent to "any

(1) 5 Times L. R. 677. (2) [1891] 1 Q. B. 283, at p. 301.

C. A. 1910

THE PORTSMOUTH.

Buckley L.J.

dispute or claim arising as to any matters as to which there are conditions in the charter party." Of those two contentions, in my judgment, the former is right and the latter is wrong.

I will in the first instance give the reasons why I think the latter contention is wrong. In reading words of reference such as are in the bill of lading the matter ought to be treated in this way. I find in the charter party words which have the effect that, as between the shipowners and the charterers, demurrage is to be paid at a certain rate. When I read the words of reference in the bill of lading I am to read them as providing that, as between shipowner and bill of lading holder, demurrage is to be paid at a certain rate. When I get to the arbitration clause I have to treat it in the same way. Reading the charter party first I find this: "As between shipowner and charterer it is hereby agreed that any dispute or claim arising out of any of the conditions of this charter party shall be referred to arbitration." That is a contract between shipowner and charterer and no one else. It is agreed between shipowner and charterer that any dispute or claim arising between shipowner and charterer out of the conditions which under this instrument are binding between shipowner and charterer shall be settled by arbitration. When I get to the bill of lading I must read it in this way: "As between shipowner and bill of lading holder it is hereby agreed that certain disputes or claims shall be referred to arbitration." The whole question is what disputes or claims are, by way of bargain between shipowner and bill of lading holder, to be referred to arbitration? To see what is to be referred I must look at the documents. It is "disputes or claims arising out of the conditions of this charter party." No dispute or claim as between shipowner and bill of lading holder can arise out of the conditions of this charter party. A dispute between those parties must arise out of some condition in the instrument which is binding as between them; the charter party is not such. The whole argument is that I am to read it as if these words "any of the conditions of this charter party" were merely words of identification, and the sentence were: "any dispute or claim as to any of the matters as to which there are conditions in this charter party." Those are not the words.

The claim which it is sought to refer to arbitration is a claim which, even when the words have been transferred from one instrument to the other, is a claim arising out of the conditions in an instrument which is not a binding instrument as between the shipowner and the bill of lading holder, but is binding as between other two parties. Therefore it seems to me that that contention cannot be maintained. I cannot substitute for the words "any of the conditions of this charter party" the words "any of the matters as to which there are conditions in this charter party."

If that be rejected, the other solution necessarily follows. Let me examine the words and see if it is not the fair meaning. "Any dispute or claim arising out of the conditions of this charter party." How does that differ in any respect from "any dispute or claim arising under this charter party"? If it arises out of conditions of the charter party, it must arise under the charter party, and if under the charter party, it must arise out of the conditions of the charter party. The words are different, but the legal effect is the same, and if you read this clause as if it were "any dispute or claim arising under this charter party" the case is the same as *Hamilton* v. *Mackie*. (1) That decision is binding upon this Court. For these reasons I think the appeal must be allowed.

KENNEDY L.J. I am entirely of the same opinion.

On the facts of this case we are asked to read the arbitration clause as applying to govern the rights of the shipowner and the bill of lading holder on account of the words which occur in the margin of the bill of lading: "Deck load at shipper's risk and all other terms and conditions and exceptions of charter to be as per charter party including negligence clause." These are the only words upon which it can be argued that this arbitration clause should be read into the contract. With regard to the words in the body of the contract, "he or they paying freight," &c., it has been settled by judicial authority that they would not bring in an arbitration clause of the charter party. But it is said, and was argued before us, that you have here got special terms written in the margin of this contract.

(1) 5 Times L. R. 677.

C. A. 1910

THE PORTSMOUTH.

Kennedy L.J.

Now, I can entertain no doubt, having regard to the context, that these " other terms and conditions " are those matters which are printed immediately below. I have compared this document with the charter party, and I find that every condition and exception is copied verbatim or nearly so from the conditions and exceptions of the charter party. What the parties to the bill of lading wanted to do is to my mind plain. They wanted to have those risks which might affect the shipowner or consignee with regard to the ship or goods, and the right to act in regard to such matters as towing and being towed, salvage, and negligence of the master, all covered in the bill of lading as between shipowner and consignee, as they are covered in the charter party as between shipowner and charterer. As a matter of business it is clear to me that if they had wanted to put in an arbitration clause they would have inserted it in the same way. They have put in everything which was meant to be included in the phrase " terms and conditions and exceptions." They have not included arbitration, but what they have included are matters proper to shipping contracts, to affect, as conditions or exceptions, the performance of the shipowner's contract in the bill of lading in regard to the carriage of the goods to which the bill of lading relates. Assume for a moment, as was assumed on the wording of *Hamilton* v. *Mackie* (1), that a clause with reference to arbitration may properly be treated as a condition of the charter party, then for the reasons given by the two other members of the Court, and which I am not going to repeat, it appears to me that it is impossible to discriminate between the contract in *Hamilton* v. *Mackie* (1) and the words in the present contract. That authority is binding upon us.

Appeal allowed with costs here and below. Order staying proceedings discharged.

Solicitors for appellants (plaintiffs): *Downing, Handcock, Middleton & Lewis, for Downing & Handcock, Cardiff.*

Solicitors for respondents (defendants): *Vaughan & Roche, Cardiff, for James D. Rawlings, Swansea.*

(1) 5 Times L. R. 677.

T. L. M.

[IN THE COURT OF APPEAL.]

C. A.
1910
Nov. 2, 18.

THE HAZELMERE.

Admiralty—Ship—Collision—Barry Dock Entrance—Crossing Rule—Application of Rule—Regulations for Preventing Collisions at Sea, 1897, *arts.* 21, 23, *and* 27.

By art. 21 of the regulations for preventing collisions at sea, "Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed . . . ." By art. 23, "Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse." By art. 27, "In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

The plaintiffs' steamship, bound to Barry Roads, Bristol Channel, for orders, passed the signal station without receiving them, and, proceeding on in an easterly direction towards Barry Dock, came into collision with the defendants' steamship, passing out in a southerly direction from between the breakwaters. In the Court below the plaintiffs' vessel was found alone to blame for coming in too close, and, by reversing, obstructing the passage out of the defendants' steamship, when she ought, as a crossing vessel, under art. 21, to have kept her course and speed.

The plaintiffs appealed on the ground that the defendants' vessel was also to blame for not, under art. 23, stopping or reversing sooner than she did:—

Held by the Court of Appeal (Lord Alverstone C.J. and Kennedy L.J., Buckley L.J. dissenting), that the defendants' vessel was not, in the circumstances, to blame, for, assuming the crossing rule to apply, a departure from that rule was justified by art. 27 in order to avoid immediate danger, as, considering the narrowness of the entrance, the shallowness of the water, the set of the tide, and the position of the breakwaters, reversing sooner than she did might have put her ashore.

Held by Buckley L.J., that the defendants' vessel was also to blame, as she should have kept out of the way, and, for that purpose, might have stopped or reversed, under art. 23, sooner than she did, there being no danger of her going ashore.

Per Lord Alverstone C.J.: *Quære* whether the regulations for preventing collisions at sea apply to the case of a vessel coming out of dock in circumstances similar to those under which the defendants' vessel was placed.

Appeal by plaintiffs, the owners of the steamship *Refugio*, against a decision of Bargrave Deane J., finding their vessel

C. A. 1910

THE HAZELMERE.

alone to blame for a collision with the defendants' steamship *Hazelmere*.

On May 28, 1910, about 6 A.M., the wind being north-westerly light, the weather fine and clear, and the tide flood of about three knots, the *Refugio*, a steel screw steamship of Newport, Mon., of 2642 tons gross and 1678 tons net register, with triple expansion engines of 255 horse power nominal, manned by a crew of twenty-two hands, and in charge of a duly-licensed Bristol Channel pilot, arrived, in water ballast, from Rotterdam in Barry Roads, where she was to receive orders for a port of loading. After passing the signal station on Nells Point she steered E. b. N. $\frac{1}{2}$ N., magnetic, along the land at a speed of one to two knots, and three or four times sounded a long blast on her whistle to attract the attention of the boatmen by whom it was expected that orders would be sent to her. In these circumstances, and when drawing up towards the Barry Dock entrance, those on board the *Refugio* alleged that they observed, over the western breakwater, about five points on the port bow, and distant about one-third of a mile, the masts and funnel of a steamship, which proved to be the *Hazelmere*, an iron vessel of 722 tons net register, and a crew of sixteen hands, proceeding from Barry Dock to Birkenhead with a cargo of coal, at a speed of about three knots.

According to those in charge of the *Refugio*, that vessel kept her course until the *Hazelmere*, as she was passing out of the entrance between the breakwaters, sounded two short blasts, and was seen to be acting as if under starboard helm, thereby causing danger of collision. The helm of the *Refugio* was thereupon put hard-a-port, one short blast sounded on her whistle, and her engines put full speed astern, but it was alleged that the *Hazelmere* repeated her signal of two short blasts, and was seen suddenly to swing to starboard as if under a hard-a-port helm. The engines of the *Refugio* were immediately put full speed ahead, and her helm hard-a-starboard, with a view to throwing her quarter clear and reducing the effect of the blow; but the two vessels came into collision, the stem of the *Hazelmere* striking the port side of the *Refugio*, both vessels sustaining damage.

According to those in charge of the *Hazelmere*, they sounded a long warning blast when coming through the Lady Windsor lock to go out of the entrance. This signal was repeated when the masts and funnel of the *Refugio* were seen over the breakwater, about three cables distant, and about three to four points on the starboard bow, and as soon as the *Hazelmere* was able to do so without danger from the breakwater, her helm was put hard-a-port and one short blast was sounded on her whistle, and afterwards her engines were reversed full speed astern; but the *Refugio*, instead of keeping her course and speed, kept in the way, and, by obstructing the entrance, brought about the collision, causing damage to the *Hazelmere*, for which her owners counterclaimed.

The plaintiffs, the owners of the *Refugio*, charged the defendants, the owners of the *Hazelmere*, with neglecting to comply with art. 19 of the regulations for preventing collisions at sea (a steam vessel having the other on her own starboard side shall keep out of the way of the other), art. 22 (avoid crossing ahead), art. 23 (if necessary, slacken or stop or reverse), art. 25 (in narrow channels keep to that side of the fairway which lies on the starboard side), art. 27 ("In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger"), art. 28 (indicating course by signal), and art. 29 (no vessel under any circumstances to neglect proper precautions).

The defendants, the owners of the *Hazelmere*, charged those on board the *Refugio* with neglecting to comply with art. 21 ("Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed"), and arts. 25, 27, 28, and 29 (see above).

1910. July 28. BARGRAVE DEANE J. This is a collision between the *Refugio* and the *Hazelmere* which took place on May 28 in the early morning, broad daylight, just outside the entrance to Barry Docks, and the question in this case is, Did the *Hazelmere* blow two short blasts to indicate that she was

1910

THE HAZELMERE.

Bargrave Deane J.

going to starboard, or was starboarding, her helm, while she was within the breakwater, and a second time just as she came out? With regard to that, I do not like to say anything offensive to anybody, but I have sworn evidence on the one side by a great many witnesses, that this two-blast signal was so made twice, and was heard, and that the vessel was seen to alter her course to port, indicating that her helm had been starboarded.

On the other hand, I am told by various witnesses, that no such two-blast signals were made, and that the vessel did not alter her course to port. What am I to do in a case where witnesses come—somewhat of equal degree, mostly pilots—and swear the direct opposite? Strange to say, two men come, on opposite sides, who were standing alongside each other, in the same spot, and the one swears one thing and the other swears the other. What I propose to do is to discard their evidence altogether, and say I am not at all satisfied that those two blasts were blown. It is said that, whether the two blasts were blown or not, the *Hazelmere* did alter her course to port, or her head went off to port. I have asked the Elder Brethren about this, and they tell me that as she proceeded out of the entrance of these docks, and caught the tide on the starboard bow, her head might temporarily be carried off to port, not necessarily under starboard helm.

The fault of this collision, I think, rests with the *Refugio*. She had no right to be so close in, as I find she was, to the entrance of this dock so as to obstruct it. In my belief, she was a great deal too close. She had come in so close because she wanted to get in touch with people on shore to get her orders. Instead of doing what she ought to have done, turned round and anchored a reasonable distance off, she kept in as close as she could, and in that way obstructed the entrance to the dock.

I think, apart from that, she was a vessel which was crossing another one, and the other vessel had her on her starboard hand, and, therefore, it was the duty of the *Refugio* to keep her course and speed. Instead of that she reversed her engines, and reversed them right in the path which she ought to, and reasonably might, have known that the other vessel was going to take.

Having dealt with the question of the two-blast signal, and the starboarding of the helm, of the *Hazelmere* in her favour, I do not see in what other way the *Hazelmere* can be found to blame. Therefore I find that the *Refugio* was alone to blame.

Nov. 2. *Laing, K.C.*, and *Hugh C. S. Dumas*, for the appellants (plaintiffs), the owners of the *Refugio*.

Aspinall, K.C., and *A. D. Bateson, K.C.*, for the respondents (defendants), the owners of the *Hazelmere*.

It was admitted on behalf of the appellants that the *Refugio* was to blame; but it was contended that the *Hazelmere* was also to blame, as it was her duty, if the regulations for preventing collisions at sea applied, to obey art. 19 and keep out of the way of the *Refugio*, and, if it was a question of good seamanship, it was equally her duty to have kept a good look-out and avoided collision by at least stopping if not reversing her engines sooner than she did.

On behalf of the respondents it was urged that, according to the master's evidence, reversing sooner than she did would have put the *Hazelmere* on the breakwater, and that the cause of the collision was the *Refugio* getting in the way when the *Hazelmere*, a laden ship, was meeting the tide in a narrow waterway, and was, therefore, within the meaning of art. 27, hampered by the special circumstances of the case. Reference was made to *The Ceto*. (1)

Cur. adv. vult.

Nov. 18. LORD ALVERSTONE C.J. This is an appeal from a decision of Bargrave Deane J. in regard to a collision which occurred outside the Barry Dock entrance between the vessels *Refugio* and *Hazelmere*. The learned judge has found the *Refugio* alone to blame.

Though there was considerable conflict on material points, the main facts were not in dispute. The *Refugio*, bound to Barry Roads, Bristol Channel, for orders, was at about 5.45 on the morning of May 28 steaming up, expecting to receive orders from the signal station at Nells Point. Not having received

(1) (1889) 14 App. Cas. 670.

C. A. 1910

THE HAZELMERE.

Lord Alverstone C.J.

such orders, she proceeded onwards in an easterly direction across the entrance to the Barry Docks, expecting a boat to come off. Her distance from the entrance was a point in dispute, the owners of the *Refugio* alleging that she was at a distance of some six hundred yards from the dock entrance, and the owners of the *Hazelmere* that she was at a distance of some three hundred feet. The learned judge has found—and, for reasons which I will presently state, I concur in that finding—that the *Refugio* was very close to the dock entrance, and whether so close as three hundred feet it is not necessary to consider, but certainly at such a distance as seriously to impede the exit from the dock entrance of a vessel coming out.

The case for the *Refugio* was that, as she was off the west pier of the dock entrance, she saw the *Hazelmere* coming out, that the *Hazelmere* gave two signals indicating that she was starboarding, and that the stem of the *Hazelmere* canted to port as though under a starboard helm. The tide at the time was flood, running to the eastward, the force being variously stated at from two to three to four knots. Those on board the *Refugio* stated that on hearing the starboard helm signal from the *Hazelmere*, and observing her to be apparently acting under a starboard helm, the helm of the *Refugio* was put hard-a-port, and her engines put full speed astern, in order to give the *Hazelmere* more room to go to the eastward. The evidence on behalf of the *Refugio* failed to satisfy the judge that any starboard helm signals were given from the *Hazelmere*. It was admitted on behalf of the appellants that they could not dispute this finding, and therefore the case was argued before us upon the admission that no starboard helm signals were given from the *Hazelmere*, and that she did not in fact starboard, and that the slight alteration of her head to port, if any, was due to the bows of the ship entering the flood tide.

The case for the *Hazelmere* was that they observed the masts and funnel of the *Refugio* over the breakwater about three cables distant and about three or four points on the starboard bow; that they had given warning blasts as they came through the dock entrance; that the *Hazelmere* put her helm a-port as soon as she could safely do so and blew one short blast, but that the

Refugio, instead of keeping her course and speed and not obstructing the entrance, kept in the way by which alone the *Hazelmere* could pass out.

Upon these facts the learned judge has condemned the *Refugio* on two grounds—first, that she had no right to be so close in to the entrance of the dock as to obstruct it; secondly, that she improperly neglected to keep her course and speed by reversing her engines in the path which she ought to and reasonably might have known the *Hazelmere* was going to take. On the first point I entirely concur in the finding of the learned judge that the *Refugio* was a great deal too close in, so close as to obstruct the exit from the dock. Whether she was as near as a ship's length it is not material to inquire, but I am satisfied that had the *Refugio* been anything like a cable and a half or two cables' lengths out, the *Hazelmere* under her port helm would have passed down to the northward of the *Refugio*, and there would have been no collision or risk of collision.

Upon the above statement of facts and the finding of the learned judge, it is quite clear that the *Refugio* was to blame. Assuming the crossing rule to apply, her duty was to keep her course, and she ought to have known that the duty of the *Hazelmere* was to port and pass under her stern, and therefore her manœuvre in reversing so as to check her way in front of the entrance and remain to the westward of the western breakwater was clearly wrong.

The difficult question which arises, however, is whether the *Hazelmere* is not also to blame, and it was alleged on behalf of the appellants that she was to blame for not keeping a proper look-out, and for not stopping and reversing when she became aware of the position of the *Refugio* on her starboard bow. When coming out of the dock entrance on a flood tide, the only proper course of the *Hazelmere* would be to port so as to put her head on tide. That this was her duty and that it was the manœuvre expected of her by those on board the *Refugio* appears from the evidence. The learned judge has found, as I have said, that the *Refugio* did come in as close as she could, and was obstructing the dock entrance. It must be taken that those on board the *Hazelmere* knew that there was a steamer,

C. A. 1910

THE HAZELMERE.

Lord Alverstone C.J.

outside bound east, but I see no reason to think that they could tell that she had come in so close to the dock entrance between the time when she was first seen and the time when the *Hazelmere* could clear the piers of the breakwaters. Under these circumstances, assuming the crossing rule to apply, I think it clearly is a case which comes within art. 27, which is that: "In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

It was contended for the appellants that on seeing the *Refugio*, or at least on seeing that she was reversing,—though it is to be observed that no reversing signal was given—the *Hazelmere* ought to have reversed her engines. If, as the judge has found on the evidence, the *Refugio* was quite close in, and obstructing the dock entrance, I am by no means satisfied that the *Hazelmere* could safely have reversed her engines at any time which would have affected either the collision or the character of the collision. The entrance is very narrow, the water comparatively shallow, and immediately to the eastward of the dock entrance there is a projecting shoal and spit of land which might place the *Hazelmere* in a great danger. Moreover, it is a dock entrance, and had she grounded near there the consequences might have been most serious to any vessels going out.

It was said on behalf of the appellants that the reasons for not reversing which occur to me were not suggested in the evidence given at the trial, and this is to a certain extent true. It seems to me that it is to be accounted for by the fact that the case really set up by the *Refugio*, and maintained until the end, was that she was misled by the starboard helm signals of the *Hazelmere* and that the *Hazelmere* was to blame for acting contrary to those signals. The only reference I can find in the whole record as to the stopping and reversing of the *Hazelmere* is in her captain's evidence in chief: "And how were your engines working at the time of the collision?—Slow ahead right up until the collision occurred—almost immediately before the collision occurred I rang full speed astern." "Why did not you go astern before?—It would put me on the breakwater."

There was no cross-examination of this witness, nor as far as I can find did any witness in the case state that the *Hazelmere* could safely have reversed, so as to keep clear of the *Refugio*. No doubt at the last and just before the collision she did reverse, but reversing at that time does not to my mind shew that she could safely have reversed earlier. We are advised by our assessors that the *Hazelmere* could only have reversed a very little earlier than she did. The master of the *Hazelmere's* answer on the point seems to have been accepted by those representing the *Refugio*, and I have no doubt this view was taken by the judge and by the Elder Brethren who advised him. For these reasons, in my opinion, the appeal should be dismissed.

In dealing with this case I have not considered the question whether the regulations for preventing collisions at sea apply. In the view I take of this case it is not necessary to consider this point, but I think it right to say that I express no opinion on the question how far they do apply in the case of a vessel coming out of dock under circumstances similar to those under which the *Hazelmere* was placed.

BUCKLEY L.J. I say nothing as to the *Refugio*. The learned judge in the Court below found her to blame, and we have heard no argument to the contrary.

As to the *Hazelmere*, the first and vital question is as to the distance outside the breakwater at which the *Refugio* was when the *Hazelmere* came out. Upon this the learned judge has left me without any finding of fact. He has found only that the *Refugio* had no right to be so close in as she was, and that she was a great deal too close, but what those expressions exactly are intended to convey I do not know. Upon this question I must therefore, upon the evidence, form my own conclusions of fact. The minimum and maximum distances are put at three hundred feet and six hundred yards respectively. The former is put forward by the defendants, the latter by the plaintiffs. In my judgment the plaintiffs are the more near to the truth. Upon the defendants' own evidence the *Hazelmere* turned under her port helm from four to six points while the action of the tide

C. A. 1910

THE HAZELMERE.

Buckley L.J.

was such as to be a resistance to her turning in that direction. Nevertheless she had time to turn, and did turn at least four to six points. Her speed was slow ahead, and is put by the defendants at about two or three knots. The distance must have been such as that she had time to make that deflection under the action of her helm. The *Refugio* must, I think, have been at a distance of at least two cables from the end of the breakwater. The evidence of the chief officer of the *Hazelmere* supports this view. He says that when he shouted the *Refugio* was not ahead of the *Hazelmere;* that when he shouted the *Hazelmere* was "nicely clear" of the breakwater; that he thought there was going to be a collision; and that three minutes elapsed after he had seen the *Refugio* before the collision occurred. Putting the speed of the *Hazelmere* as before at three knots, this would give about three hundred yards, or a cable and a half. At her speed the *Hazelmere* had, if this last evidence is right, three minutes, and if two cables' lengths is right, about four minutes, during which she maintained her speed and helm. The *Refugio* was coming astern. The *Hazelmere,* in fact, by maintaining her helm and speed brought herself into collision with the *Refugio,* which was coming astern to meet her. The relative positions of the vessels were such that the *Hazelmere* was, under the rules, bound to keep out of the way of the *Refugio,* and the *Refugio* was bound, under the rules, to keep her course and speed.

Accepting all the defendants' evidence as to the extent to which the *Hazelmere* had previously seen and had been prevented from seeing the *Refugio,* the facts on the defendants' own evidence are that the *Hazelmere,* on clearing the breakwater, saw the *Refugio* with headway on her, but with her propeller stopped, and saw that she immediately began to reverse. The *Refugio* did not blow the proper three blasts, but the *Hazelmere* saw her propeller and saw her reversing.

The point of the case, I think, is what was, under these circumstances, the duty of the *Hazelmere.* What she did was to put her helm hard-a-port and to continue her engines at the same rate at which they were running right up to the time when the collision occurred. She did not stop, she did not reverse, and

this notwithstanding that she knew that the *Refugio* (wrongly, I will assume) was reversing, so as to bring herself directly into the point of danger if the *Hazelmere* maintained the helm and maintained the speed which she was using. The *Hazelmere* was the vessel which, under art. 23, was bound to keep out of the way, and was bound, if necessary, to slacken her speed or stop or reverse. She was not, I think, relieved from the duty of obeying the last part of this rule because the *Refugio* was breaking another rule. But then it is said that the *Hazelmere*, had she reversed her engines, would have put herself into danger in this narrow gut and might have driven herself ashore. Her master said that he did not go astern at an earlier moment "because it would have put him on the breakwater." By this I think he means the breakwater on his starboard side, the western breakwater. I do not follow how this could have been so, as matter of fact. His course was such and the position of the western breakwater and of the eastern shore was such that if by reversing he would have gone ashore at all it would have been on the eastern shore. There is no suggestion that that would have happened. Moreover, the *Hazelmere* did at a later moment in fact reverse and no evil consequence ensued. Further, apart from reversing, the *Hazelmere* did not even stop her engines, but went on at the same speed right up until the collision occurred. So far as I see, upon the evidence, she could certainly have stopped without danger, and had she stopped the sternway of the *Refugio* might have carried her out of the dangerous position.

The result of these considerations is to arrive at the conclusion that the *Hazelmere* was also to blame. I prefer to rest my decision upon these grounds, although I think there is substantial reason for saying that the *Hazelmere* was not keeping a proper look-out. I think the order under appeal should be varied by finding both vessels to blame.

KENNEDY L.J. The appellants' counsel in this case accept so much of Bargrave Deane J.'s judgment as pronounces that the *Refugio* was to blame both for faulty navigation in coming in too close to the entrance of the Barry Docks, and in not keeping

C. A. 1910

THE HAZELMERE.

Kennedy L.J.

her course and speed as she ought to have done in compliance with the regulations for the prevention of collisions at sea; and they accept also the adverse finding of the Court, upon the main issue at the trial, that the *Hazelmere* did not give a two-blast helm signal, and did not starboard her helm as she was leaving the entrance. But they have argued before us that the *Hazelmere* ought to be held partly responsible for the collision on the ground that a proper look-out was not kept on board of her, and that she did not stop and reverse earlier than she did.

The learned judge in the Court below has not dealt specifically with either of these two points. After considering particularly the question of the alleged two-blast signal and starboard helm, he has, in regard to all other charges against the *Hazelmere*, exonerated her from blame in general terms. I have come to the conclusion that the appellants have not proved that he was wrong; but I regret that this Court has not the advantage of any explicit statement by the Court which heard the oral evidence, of the considerations which moved it to acquit the *Hazelmere* of blame in respect of the two charges upon which the appellants now rely.

In regard to the first of these two charges—an insufficient look-out—I do not feel much difficulty, after carefully considering the notes of the evidence. I do not feel myself justified in holding that those on board the *Hazelmere* must, if they had kept a proper look-out, have realized the close proximity of the *Refugio* to the entrance before they did, which was—as I understand the evidence of the master of the *Hazelmere*—only when the *Hazelmere* was very nearly between the eastern and western breakwaters. The *Hazelmere* was not a large vessel, she was loaded, and the height of the long western breakwater lay between her and the *Refugio* as she came down under it along the lock or channel from the Barry Dock. All that could be seen from the deck was the upper part of the masts and funnel of the *Refugio* in a westerly direction; and this afforded no clear indication of the close proximity of the *Refugio* to the line of the entrance. And one must not forget that those on board the *Hazelmere* might reasonably suppose that those in charge of the

Refugio would not be guilty of such gross negligence as to navigate that vessel so as practically to seal the exit for outward-going vessels.

The second point made by the appellants, namely, the admitted action of the *Hazelmere* in holding on, after the position of the *Refugio* was ascertained, at slow speed, and neither stopping nor reversing until almost at the moment of collision, appears to me a much more serious matter. Obedience to art. 23 has ever been held to be of the utmost importance. But, of course, in a particular case there may be present special circumstances which excuse, or even necessitate, different action. Art. 27 provides for such cases. Here, as it appears to me, everything depends upon two connected facts, the distance of the *Refugio* from the dock entrance, and the existence of a danger to the *Hazelmere* of getting aground or coming into collision with the breakwater if she had stopped or reversed before the time when her master gave the order just before the collision occurred. The defendants' witnesses put the *Refugio* at a distance of only some three hundred feet from the entrance. The witnesses for the *Refugio* put her two and a half to three cables off the entrance. That the distance was greatly overstated by the witnesses for the plaintiffs I feel no doubt. It seems to me that the collision, in those circumstances, could not have occurred as it did. But if the distance of the *Refugio* was anything like two cables, so that the *Hazelmere* had space, after getting well clear of the breakwater, under her port helm, without risk to herself, to take off her way by stopping, or by stopping and reversing, before the collision, I should have felt considerable difficulty in holding that she was not to blame for not duly observing art. 23. I thought at one time that the fact that, on the evidence of her own witnesses, she had altered four or five or possibly even six points, under her port helm before the collision, pointed in this direction. But it is to be remembered against such an inference that she did not come out into still water, but into a three-knot tide, running eastward, which might have an effect in making her head cant under the port helm in a smaller circle than it would otherwise have done. And against the view that there was any but a very short distance between the *Refugio*

C. A. 1910

THE HAZELMERE.

Kennedy L.J.

and the breakwater is the fact—to which I think, on the hearing of an appeal, very great weight indeed is to be attached—that the Court which heard the evidence on both sides, on the most important issue in the case, namely, the alleged starboarding of the *Hazelmere*, was unable to accept the evidence called upon the part of the plaintiffs; and, further, expressly found that the *Refugio* was a great deal too close to the dock entrance—so close as to obstruct it. I can interpret this last finding only as meaning that the distance of the *Refugio*, if not one of only three hundred feet from the dock entrance (as the defendants' witnesses deposed), was at least very much nearer that position than the distance of two and a half cables; so much nearer that it might well be that—as the master of the *Hazelmere* deposed in cross-examination—he could not safely move the engines astern before he did, because, if he had done so, he would have put his ship on the breakwater. If this evidence is true, I think with the Lord Chief Justice that art. 27 applies to exonerate the *Hazelmere* from blame. And I agree with the Lord Chief Justice that it is noteworthy that no attempt appears to have been made by the plaintiffs' counsel to sift or challenge this answer either by cross-examination of the deponent upon it, or in the cross-examination of other witnesses for the defendants. Stopping, without reversing, was never even suggested in cross-examination either to the master of the *Hazelmere* or to any other of the defendants' witnesses. The master's answer, had he been asked this question, would doubtless have been the same as that to the question as to reversing. In the Court below the learned judge said: "Having dealt with the two-blast signal and the starboarding of the helm, I do not see in what other way the *Hazelmere* can be found to blame." I can only suppose that in the peculiar circumstances of this case—especially the narrowness of the entrance, the neighbourhood of the breakwater, the eastward setting tide, and the closeness of the *Refugio*—the Court which heard the evidence was satisfied that no blame, either in respect of seamanship or as a breach of art. 23, could justly be imputed to the *Hazelmere* in not stopping and reversing earlier than she did. The appellants have not persuaded me

that this was an erroneous conclusion, and I think that this appeal must be dismissed.

C. A. 1910

THE HAZELMERE.

Solicitors for appellants (plaintiffs): *Thomas Cooper & Co.*

Solicitors for respondents (defendants): *William A. Crump & Son, for Gilbert Robertson, Cardiff.*

T. L. M.

PRETTY *v.* PRETTY (THE KING'S PROCTOR SHEWING CAUSE.)

1910

Dec. 13, 14, 15, 20.

Divorce—Wife's Petition—Adultery of Petitioner conduced to by Husband's Cruelty and Misconduct — Material Fact — Suppression and Denial by Petitioner—Verdict and Judgment for King's Proctor—Discretion of Court —Petition not dismissed—Decree Absolute.

In exercising the discretion conferred upon it by s. 31 of the Matrimonial Causes Act, 1857, the Court ought to look at every aspect and circumstance of the case, including the consequences that would ensue, not only in the present but in the future, from a refusal to exercise that discretion in favour of the petitioner.

Where the conduct of the husband (respondent) had driven the wife (petitioner) to leave him and had conduced to her subsequent adultery, the Court exercised its discretion in her favour and allowed the decree to be made absolute, notwithstanding the fact that, at the hearing of the petition, acting upon the advice of counsel, of which the Court now expressed disapproval, the petitioner had said nothing as to her association and voyage to New Zealand with a man; and notwithstanding the further fact that she had, upon issues raised by the King's Proctor, denied on oath the adultery with that man, which denial had not been believed by the jury.

THIS was a case in which the King's Proctor on June 11, 1910, filed his plea shewing cause why the decree nisi pronounced on December 6, 1909, should not be made absolute.

By his plea, which was filed on June 11, 1910, the King's Proctor alleged that material facts had been withheld from the knowledge of the Court, and that the petitioner had committed adultery with a man named Halfpenny, with whom she left England for New Zealand on board the steamship *Rimutaka* on or about June 12, 1908, and asked that the decree nisi might be rescinded and the petition dismissed.

On June 21, 1910, the King's Proctor filed further particulars

1910

PRETTY v. PRETTY.

of the allegation of adultery, charging the petitioner with adultery with Halfpenny on June 9, 10, and 11, 1908, at the Waterloo Hotel, York Road, Lambeth, in the county of London.

The petitioner on June 23, 1910, filed an answer to the King's Proctor's plea, denying the allegations of adultery.

The cause was set down on July 12, 1910, for hearing before the Court and a special jury, and was tried in due course on December 13, 14, and 15, 1910. In the course of the trial the petitioner went into the witness-box and denied on oath the allegations in the King's Proctor's plea, of which evidence had been given.

It also transpired that, previously and before the hearing of the petition, the petitioner had given to her solicitor an account of Halfpenny's associations with her, including the voyage to New Zealand; but that she was advised, at the time of that hearing, that, as she denied actual misconduct, she need not disclose those matters to the Court.

The jury found for the King's Proctor and against the petitioner.

1910. Dec. 20. *Rawlinson, K.C.*, and *W. O. Willis*, for the King's Proctor, asked that the decree nisi might be rescinded and the petition dismissed with costs.

Duke, K.C., and *Turrell*, for the petitioner, asked the Court to exercise its discretion, under s. 31 of the Matrimonial Causes Act, 1857, by declining to rescind the decree or to dismiss the petition.

The further facts, so far as material, are referred to in the judgment.

Dec. 20. BARGRAVE DEANE J. This is a case in which the King's Proctor, having appeared to shew cause why the decree nisi should not be made absolute, alleged that material facts had not been brought to the knowledge of the Court, and that the petitioner herself had been guilty of adultery. Upon the finding of the jury, the King's Proctor is, of course, entitled to judgment with costs.

The only point remaining is as to what I ought to do with regard to the petition and decree. The facts are certainly very

exceptional and peculiar. The difficulty I have is due to the course that this case has taken, under advice which, although it may have been given with the best possible motives, I cannot help saying was not good advice; and the course adopted was contrary to the best interests of the petitioner herself. The petitioner, having been charged in the King's Proctor's plea with having committed adultery, denied it in her answer, and has gone into the witness-box and denied it on oath. The jury did not believe her, and it is right that I should say that I agree with the jury. I do not think they could properly have come to any other conclusion on the evidence before them.

I have, therefore, to deal with a case where the petitioner has not only been guilty of adultery, but where she has supported the denial in her answer by committing perjury.

The question is, what am I to do in this matter?

The Matrimonial Causes Act, 1857 (1), s. 30, enacts, in substance, that, where the adultery complained of, in a suit for dissolution, has been connived at or condoned by the petitioner, or where the suit has been presented or prosecuted collusively, the Court "shall dismiss the said petition."

Then s. 31 says: "In case the Court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the Court shall pronounce a decree declaring such marriage to be dissolved." The word used, be it noted, is "shall"—"provided always"—and this is the part that affects this case—"that the Court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery . . . ." Therefore the Court has thrown upon it by the Legislature a responsibility, in the way of discretion, which is always a very difficult matter to deal with.

I must recite what I believe to be the true facts of this case.

This lady, born of respectable parents, living with her

(1) 20 & 21 Vict. c. 85.

1910

PRETTY v. PRETTY.

Bargrave Deane J.

father, meets in her father's employ, and is constantly in the society of, a groom by the name of Pretty, who, I have not the least doubt, seduced her. I do not believe that he committed a rape upon her, as was suggested; and I say that, because her whole course of conduct makes it impossible to believe that it was a case of rape: she made no complaint, but continued to live on, with this man still in her father's service, being driven about the country by him, and behaving in a way that no woman could be doing if a rape had been committed upon her by him. But I am satisfied that this girl of only seventeen was seduced by that man; and then, finding herself pregnant by him, secretly went off and, when little more than a child, was married to him on May 1, 1907.

The natural result was that a marriage contracted under such circumstances was a failure.

In due course her child was born, and she experienced at the hands of her husband the grossest cruelty, and, apart from actual assaults, the most odious conduct; and, eventually, he also committed adultery.

That was her position. I do not know whether it is true, or not, that she had communicated with her mother's relatives in New Zealand. She has sworn it; but I cannot accept her evidence alone, and there is no evidence before me to corroborate her story. But when she did go out to New Zealand, she did, no doubt, communicate with those relatives, and letters have been put in, written from her uncle's house.

Some time before starting, she had evidently determined to leave her husband, and she had every reason for wishing to do so. I have come to the conclusion that she was practically forced to leave her husband's house: that his conduct was such that she could no longer live with him. And then she made the acquaintance of the man Halfpenny, who was employed by her husband as a cabdriver. I do not accept the whole story as told by this man. The petitioner may, in the first instance, have consulted him as to how she could get away to New Zealand; but I think that, before they did start, she and Halfpenny had come to some arrangement to go there together. Her moral calibre was gone long before and they got on warmer terms, and

eventually they went together under circumstances that no one can doubt as to the relations subsisting between them on the passage from England. She, according to the evidence of Halfpenny, took to flirting with officers on board; but, whatever the cause, I am satisfied from the evidence before me that there was, during the voyage, a violent quarrel between her and Halfpenny in their cabin, and that she there and then complained to the captain of the ship, though I am not satisfied that the complaint she made was that Halfpenny attempted to commit a rape upon her. The captain's evidence on the point is extremely doubtful, and he says that his memory is not clear as to the details of the complaint that was made to him by the petitioner; and I am pretty sure that the captain would have put the man in irons if the complaint had been that a criminal assault had been attempted on her.

If this petitioner had come before the Court and told all the facts in the first instance, instead of following the unfortunate advice of her counsel in keeping all about her relations with Halfpenny a secret: if she had said that she had been driven from her husband's house and that this liaison with Halfpenny was the result of her unfortunate position, then she would have brought herself within cases well known in this Court—there are several of them in the reports—where such a plea in defence has been accepted.

Some people think that, in such matters, you must treat men and women on the same footing. But this Court has not taken, and, I hope, never will take, that view. I trust that, in dealing with these cases, it will ever be remembered that the woman is the weaker vessel: that her habits of thought and feminine weaknesses are different from those of the man: and that what may perhaps be excusable in the case of the woman would not be excusable in the case of the man. Where you find that the woman has been guilty of adultery and that her adultery has resulted from her husband's conduct towards her, this Court does, and I hope always will, make allowances and treat her error with leniency.

In the case of the present petitioner, if she had told the whole truth, and had said that her husband's abominable conduct

1910

PRETTY v. PRETTY.

Bargrave Deane J.

towards her had driven her to the misconduct with Halfpenny, as I am satisfied that it did, I feel sure that the Court would, on the hearing of her petition, have exercised its discretion in her favour. The question is whether I ought to exercise that discretion now. I have to look at the consequences and I have given the case my most anxious thought and consideration. I have some doubt whether I am justified in exercising the discretion in the present case. But I have to look at all the facts as well as at the consequences of refusing to exercise the plain discretion which the Legislature thought fit to entrust to this Court.

Here is a young woman, now only twenty-one years of age. Her life has been fairly described as a tragedy. She lost her mother when very young indeed, and she had only recently come home to her father's house when she met the man who seduced her and whose wife she became, whose conduct towards her and vile treatment of her has made life with him an impossibility, and to whom, if this decree is rescinded, she will be bound for the rest of her life. With what result? It can only result in absolute ruin to her. It has been said that I ought not to trouble myself about that. But I think that, the Legislature having imposed upon me the responsibility of exercising my discretion, I ought to look at every conceivable aspect and circumstance of the case, not only in the present but in regard to the future; and I feel bound to save this petitioner from the absolute ruin which I am certain must ensue if I were to rescind this decree and dismiss this petition. What is there on the other side of the picture? I do not know that I have ever before met such a peculiar set of circumstances. In the course of the proceedings which the King's Proctor was taking against her, the petitioner made the acquaintance of a gentleman who fell in love with her, and, through his love for her, behaved in a very odd manner—honourably no doubt, but not wisely. He, I am told, was, and still is, in spite of the verdict of the jury, prepared to marry her. He is a gentleman in her own original sphere of life, who will lift her up out of the slough of misery and distress and despair into which, through her husband, she has fallen. Can there be a doubt in the mind of any human being as to what I ought to do? I must put aside the feelings of indignation with

which I naturally regard the petitioner owing to her having committed perjury. Some people seem to think that it is not a matter to be surprised at that people who have sinned should also commit perjury. There can be no greater mistake. In this Court, perhaps above all other Courts, honesty is the best policy; and, where the honest and straightforward course is pursued, this Court is always willing to recognize the weakness of the sex.

In the present case, notwithstanding all that has occurred, I am prepared, after mature consideration, to give effect to the feelings of humanity which I believe the Legislature had in mind when the particular section of the Act of 1857 was passed. As I have already said, I had some doubt and hesitation in coming to this conclusion; but I have faced that, and I have felt it to be my duty to do what is right. I feel that I am doing right in coming to the conclusion I have now expressed.

The King's Proctor has done his duty without partiality and he is of course entitled to judgment with costs. Still, he has not urged anything to satisfy me that I ought not to give effect to the feelings I have just expressed.

The result is that I shall not dismiss this petition, but shall allow the decree to be made absolute in due course, in the hope and belief that, as soon as possible, the petitioner and the gentleman who has expressed his willingness and desire to marry her may get married, and that the past may be forgotten.

Solicitors: *The King's Proctor; H. S. Bridge.*

H. D. G.

1911
Jan. 13.

RUCK *v.* RUCK AND CROFT.

Divorce—Pleas of Connivance and Conduct conducing to Adultery—Evidence of Respondent—Cross-examination—The Evidence Further Amendment Act, 1869 (32 & 33 *Vict. c.* 68), *s.* 3.

Where, in a suit for dissolution of marriage brought by a husband, the wife goes into the witness-box and gives evidence of her own adultery in support of pleas of connivance and conduct conducing to adultery raised by her answer, she may be asked questions in cross-examination relating to the time and circumstances of such adultery.

In this case the husband by his petition filed on October 8, 1909, prayed for a dissolution of his marriage and claimed damages on the ground of his wife's (respondent's) adultery with the co-respondent.

Both the respondent and co-respondent by their answers filed respectively on December 8 and 9, 1909, denied the adultery, and the respondent also alleged that the petitioner had conduced to and connived at the adultery (if any).

The petitioner, by his reply, joined issue, and denied the charges of connivance and conduct conducing to the adultery.

The case came on for trial before the President and a common jury.

Barnard, K.C. (*Durley Grazebrook* with him), for the petitioner.
Bayford, for the respondent.
Bucknill, for the co-respondent.

During the trial the respondent went into the witness-box and gave evidence of adultery committed by her with the co-respondent in support of the allegations of connivance and conduct conducing to adultery.

In the course of the cross-examination of the respondent, *Barnard*, *K.C.*, for the petitioner, put the following question to her:—

When did the intercourse first begin? Did it begin before your marriage?

Bayford objected to questions as to adultery. The section of

the Act (1) only contemplates the case where a witness goes into the box on some question other than adultery, and no question can be put to the witness, who has not denied adultery, tending to shew adultery by the witness.

SIR SAMUEL EVANS, PRESIDENT. Is there any authority on this point?

Barnard, K.C. No, not so far as is known. This witness has been called to prove connivance and conduct conducing to adultery, and it is absolutely necessary to go into the whole matter as to her relations with the co-respondent. Unless this is done, the real facts cannot be ascertained.

SIR SAMUEL EVANS, PRESIDENT. In my opinion the question is admissible. It is not put to a witness who has kept her mouth closed on the subject of adultery; it is put to a witness who has alleged and given evidence of her own adultery, with reference to her husband's alleged knowledge of, and his conduct in relation to, that adultery. The statute protects witnesses who have refrained from giving evidence as to any alleged adultery. It was not intended to protect, and does not protect, witnesses who have given evidence of their own adultery from cross-examination upon the circumstances relating to such adultery.

The cross-examination of the respondent then proceeded. She admitted that the intercourse with Croft commenced about the year 1889, while she was in his service, and that from 1889 onwards she had been Croft's mistress. She said she did not tell her husband that, and he had no idea of it when he married

(1) The Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 3, is as follows:—

"The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

1911

RUCK v. RUCK AND CROFT.

her. So far as she knew, her husband thought he was marrying a pure woman.

No evidence was called by the co-respondent.

In the result the jury found for the petitioner on all the issues raised and assessed the damages at 100*l.*

Solicitors for petitioner: *Kingsford, Dorman & Co., for Kingsford, Drake & Coke, Ashford.*

Solicitor for respondent and co-respondent: *W. A. E. Headley, for Alfred Booth Hearn, Chatham.*

H. D. G.

1911

Jan. 31; *Feb.* 1, 2, 3.

THE EZARDIAN.

Admiralty—Ship—Collision—Upper Humber—Rounding the Bend at Whitton Gas Float No. 3—Navigation.

Although there is no positive rule with regard to the navigation of the narrow deep-water channel in the neighbourhood of Whitton gas float No. 3 in the Upper Humber, the practice, based on good seamanship, requires that those in charge of a steamship, proceeding against the flood tide, should avoid meeting another vessel at the gas float, and should, therefore, wait until the vessel proceeding with the tide has rounded the bend.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of cargo lately laden on board the steamship *Lloyd.*

The defendants were the owners of the steamship *Ezardian.*

The case is reported on the question of the proper mode of navigating the narrow deep-water channel in the neighbourhood of Whitton gas float No. 3 in the Upper Humber.

On October 15, 1910, about 4 P.M., the weather being fine and clear, the wind south-easterly moderate, and the tide last quarter flood of about two knots, the *Lloyd*, an iron screw steamship belonging to the port of Memel, of 896 tons gross register, 224 feet long, engines of 87 horse power nominal, a crew of fifteen hands, and drawing 14 feet forward and 15 feet aft, was in the Upper Humber, between the Middle Whitton and the Upper Whitton lightships, in the course of a voyage from Memel

1911

THE EZARDIAN.

to Goole with a cargo of wood pulp and sleepers, including a deck cargo. The *Lloyd* was in charge of a duly-licensed pilot for the Upper Humber, and had the screw tug *Salvage* fast ahead. She was proceeding up the river on the starboard side of the channel, making about seven-and-a-half knots through the water, when those on board observed several steamships coming down the river, one of which, distant about three miles and bearing about two points on the port bow, proved to be the *Ezardian*, a steel steamship built at Goole, 200 feet long, of 874 tons gross register, engines of 137 horse power nominal, a crew of fifteen hands, and fitted with a large rudder. She was proceeding from Goole to London with a cargo of coal, and was on a down river course for No. 3 Whitton gas float, and on her starboard side of the channel, making about ten knots.

The *Lloyd* was kept on her course, and, having rounded the Upper Whitton lightship, she followed the deep-water channel course for the Whitton gas float No. 3, keeping on the starboard side of the channel. As the *Lloyd* drew up towards the slack water and strong eddy which, on the flood tide, is encountered in the neighbourhood of No. 3 float, those on board of her noticed that the *Ezardian* was coming down fast and, instead of waiting above the bend, was overtaking and passing another downcoming steamship. One long warning blast was sounded on the whistle of the *Lloyd*, and her engines were put to slow. After a short interval the helm of the *Lloyd* was put hard-a-port for the purpose of rounding the bend at the No. 3 float, one short blast was sounded on her whistle, and her tug towed off on the starboard bow. As the *Ezardian* approached at considerable speed, the helm of the *Lloyd* was kept hard-a-port, and her tug continued to tow as hard as she could on the starboard bow, and the whistle of the *Lloyd* was again sounded one short blast. About this time the *Lloyd* was entering the slack water and eddy, and it was seen that she was refusing to answer her port helm. The engines of the *Lloyd* were thereupon stopped and put full speed astern, and three short blasts were sounded on her whistle; but the rope by which the *Lloyd's* tug was made fast carried away owing to the strain to which it was subjected. The *Ezardian* replied with three short blasts on her whistle, but

1911

THE EZARDIAN.

came on at considerable speed, and with her stem struck the starboard side of the *Lloyd* about abreast the fore rigging a heavy blow, doing the *Lloyd* such damage that she shortly afterwards sank with the plaintiffs' cargo on board.

The main contention raised by the plaintiffs against the *Ezardian* in their statement of claim was that she failed to comply with arts. 27 and 29 of the regulations for preventing collisions at sea, as applied by Order in Council of July 19, 1910, to the river Humber (1), and with r. 22 of the rules in force in that river (2), in that she, a vessel navigating against the tide, neglected to ease her speed and to wait until the *Lloyd*, a vessel proceeding with the tide, had passed through the well-known eddy and slack water existing in the neighbourhood of Whitton gas float No. 3.

According to the defence set up by the owners of the *Ezardian*, "When the *Lloyd*, instead of shaping to pass the *Ezardian* port side to port side as she could and ought to have done, kept over to the southward and into the *Ezardian's* water, and the tow rope of the *Lloyd's* tug parted, the *Ezardian's* engines were at once put full speed astern, her helm was put hard-a-port, and three short blasts were given," but the vessels came into collision and the *Ezardian* sustained damage. The defendants specifically denied that there was any obligation for the *Ezardian* to wait as alleged by the plaintiffs either according to the Humber rules or at all.

(1) Art. 27: "In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

Art. 29: "Nothing in these rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

(2) Humber Rules, 1910: No. 22. "A vessel shall be navigated with care and caution and at such a speed and in such a manner as not to endanger the lives of or cause injury to persons or involve risk of collision by causing a swell or endanger the safety of other vessels or moorings or cause damage thereto or to the river banks. Special care and caution shall be used in navigating such vessel where there is much traffic . . . ."

1911. Jan. 31, Feb. 1, 2, 3. *Batten, K.C.*, and *Hugh C. S. Dumas*, for the plaintiffs, the owners of cargo lately laden on the *Lloyd*.

1911

THE EZARDIAN.

Bateson, K.C., and *John B. Aspinall*, for the defendants, the owners of the *Ezardian*.

The facts, and arguments of counsel, fully appear from the judgment. On behalf of the plaintiffs, *The Talabot* (1) was cited. In that case a collision occurred at a strong bend in the river Scheldt, and, though there was no positive rule with regard to the navigation, the plaintiffs' vessel navigating against the tide was held to blame for disregarding the practice and not waiting until the defendants' vessel coming in the opposite direction had cleared her. Butt J. in his judgment refers to the positive rule (No. 47) of the Thames Conservancy to this effect, and the learned judge added that if there had been no such practice in the river Scheldt, he and the Elder Brethren were of opinion that it was bad navigation for the vessel with the tide against her to proceed as she did under the circumstances. On the question of the plaintiffs' vessel not being adapted to navigate, with safety to other craft, the difficult bends in the river Humber, the cases of *The Campania* (2) and *The Tirzah* (3) were referred to by counsel for the defendants.

BARGRAVE DEANE J. I have no doubt at all about this case. The real point is whether this is a dangerous place where the collision occurred, and on the one side the witnesses called by counsel for the defendants all say there is no danger at all about it; but I do not know why these Goole ships are specially constructed with extra big rudders if there is nothing difficult about the navigation, or why it should be suggested that foreign vessels coming up without them must take the risk. What is the fact? Here is a place where the channel is constantly shifting, and there is a point, a little lower down the river, called Whitton Ness, and the tide that comes up strikes Whitton Ness, and sometimes there is a channel which runs off to the north, right to the north shore, and then runs down again to the south

(1) (1890) 15 P. D. 194. (2) [1901] P. 289.
(3) (1878) 4 P. D. 33.

1911

THE EZARDIAN.

Bargrave Deane J.

shore—sometimes it goes straight along the south side, and sometimes it runs up to the north and then sharp down to the south, but whichever way it goes there is always, as the master of the *Ezardian* says, a swatch-way running along the south shore between Whitton Ness and the mouth of the Trent. Of course, when it is low water there is less current going through, but when it is high water a fair amount of current goes through, and I am told, not only by the witnesses called for the plaintiffs, but also by the Elder Brethren, whose knowledge is great and who know the actual place, that there is always an eddy of a certain strength between the Whitton Point and the westward, and that the strength of that eddy depends upon the lie of the channel. When I am told that, and that is in this case the sworn positive evidence, which in my opinion is stronger evidence than the negative evidence of the defendants, of course I have to give effect to that which I believe to be the truth on the one side, as against that which I do not believe on the other side. Now, who are the people who speak about it? First of all there is the master of the tug which was in attendance upon this German steamer. He says this: "The *Lloyd* steered well. She was laden, and she wanted help when crossing the tide,"—that is what he was there for—"when she came to this place she would not come round. The flood tide caught the port quarter while the head of the *Lloyd* was in the slack. It is not safe to try to pass at that place. Downward bound vessels must wait for upcoming vessels to round. That is the custom of the river." Here is a man working every day in this river, and that is what he says. The next witness is the chief officer of the *Hessle*, a vessel which passed the *Lloyd* on the port bow just below the place of danger. He says: "We had rounded No. 3 buoy, and her tug was just above the float. There is a slack above No. 3 buoy which would affect a vessel coming up. A vessel is liable to sheer and run head first on to the shore, and it is not prudent to pass a vessel there. There is no difficulty in a vessel going down stopping above the spot in question. The collision was caused by the *Ezardian* overhauling and passing the *Argus*, and trying to pass the *Lloyd*, in the slack tide. The *Lloyd* appeared to be going to the southward when we passed her

1911

THE EZARDIAN.

Bargrave Deane J.

and if we had been a little later she would have hit us." That is the chief officer of the *Hessle*, and I shall presently read what the master of the *Hessle* says in contradiction of the chief officer. Then there is the mate of the lightship. He said : " There is a slack tide at the place. I have known vessels refuse to answer their helms there. The peculiarity of the tideway there is well known and downcoming steamers should ease down and not pass upcoming vessels there. It is the worst place in the river." Then the superintendent of the Upper Humber Conservancy Board said : " There is an eddy between the green light jetty and the Whitton jetty, which results in some vessels failing to recover themselves and they may go ashore. They will not answer their port helm. This is a difficulty well known to all the pilots and navigators, and any vessel coming down and meeting another about No. 3 buoy should ease down and not pass her there." Then there is the evidence of a licensed pilot for the Upper Humber. He says " I have had fifteen years' experience up and down the river, and I was navigating a vessel on that very day. It is always dangerous to pass another vessel there and I ease up and let the other vessel pass. Other vessels have eased up for me. I have known vessels go ashore there." Those are witnesses called on behalf of the plaintiffs.

As against those witnesses we have the pilot of the *Lloyd* called by the defendants. I have already, in the course of the case, said that the opinion of the Court is that he is an absolutely untrustworthy witness. I do not believe his evidence on a great number of points, and as I do not believe his evidence on a great number of points I am not going to take his evidence on any point as being of any serious value. He says that the collision was not due to an eddy ; that the tide had nothing to do with it ; there was no eddy, and it was not a dangerous place, and vessels did not come into collision there or run ashore. He said, " I never slow down, and I know of no practice which would require the *Ezardian* to wait, and I have been a pilot for four-and-a-half years." He is called by the defendants, and he goes to that length. Then the master of the *Ezardian* says that it was not a dangerous spot in which to meet a vessel ; that there is no eddy there, but there is a slack, and that you get a stronger tide on the bow, in the slack,

1911

THE EZARDIAN.

Bargrave Deane J.

than on the stern, and that it assists her helm in sending the bow to starboard. Then he says there is this swatch-way. The chief officer of the *Ezardian* says there was no danger that she (the *Lloyd*) would not answer her helm ; that there was no eddy and no slack; and " I did not ease down to give the *Lloyd* more room." That last statement is in direct contradiction to the evidence of the other officers of the *Ezardian* on that point. The second officer said : " Our engines were stopped for the *Lloyd* before she blew her one blast. It was to let her come round." Then there is the master of the *Hessle*. He says he holds a master's certificate and a pilot's licence and that he knows the river very well. He says there is an eddy near No. 3 float early on the flood, and less at half flood, and so on; and that it is worse when the channel is near Whitton jetty. He says he remembers how it was at the time of the collision, and that he is sure there was no eddy there at that time, and it was quite safe for him to pass even a laden sailing ship, coming up on the flood, at that place. He added: " I have known it dangerous there, but that would be half an hour before high water." This collision happened in the last quarter of the flood.

Now, that is the evidence, and upon the face of that evidence, even if I had not got the valuable advice of the Elder Brethren, I should have no hesitation in saying that the evidence satisfies me that this was a dangerous place at the time, and that it was the duty—whether there is a custom or practice I do not mind, but I think there is a practice—it was the duty of the *Ezardian*, going down and seeing this heavily-laden vessel coming up on the flood, to have eased down before the vessel had got into the place of difficulty. Instead of doing that, this vessel, the *Ezardian*, started as the rearmost vessel of all from Blacktoft, five or six miles away, with the *Argus* in front. The *Argus* slowed down to do the very thing which she, the *Ezardian*, ought to have done, but instead of slowing down the *Ezardian* goes past the *Argus* and runs on and puts herself into this place where difficulty might occur and did happen. I think that was extremely bad seamanship, and I think the master of the *Ezardian*, professing to be a pilot, must have known the difficulty

1911

THE EZARDIAN.

Bargrave Deane J.

of that particular place, and he was bound to take the precaution which, I believe, the *Argus* did take. That fact in itself ought to have been a warning to him.

What I find with regard to this place is this, and it is the advice given to me. I believe there is always an eddy above and west of Whitton Ness during the flood stream. The nearer the bend in the channel marked by No. 3 float happens to be to Whitton Ness, the greater must be the effect of this eddy on vessels negotiating the bend. On the other hand, when the channel between the Upper Whitton lightship and No. 3 float happens to be well to the west, as at the time of this collision, and trending more or less across the general direction of the flood stream, the greater the difficulty of rounding No. 3 float, and the probably greater risk of a vessel failing to answer her port helm and running across the channel on to the Plumb (the bank on the south side), when she enters the slack. That I believe to be the true condition of things at the place. I do not think it very much matters how the channel is, unless there is only one channel, which runs along the south shore and nothing at all to the northward. Then, perhaps, you would not have cross streams; but whenever there are cross streams meeting at this place on the flood tide, then this extra precaution should be taken. I am not laying down a general rule, but merely saying why I think this extra precaution should be taken whenever there is, as on this occasion, a double stream meeting at No. 3 float. It is said that blame is also attachable to the *Lloyd* because of bad navigation; in other words, that the pilot is to blame. I do not find that that is established. It is said that the *Lloyd* ought to have ported before she came to No. 3 float. I do not think she could. In my opinion she was hampered by four vessels which took the risk and passed up so as to reach and pass her before she got to the No. 3 float. Passing those vessels she had to keep to the starboard side of the channel going up, and she had to remember that she was crossing the flood tide with the tide on her port bow, setting her to the westward or starboard side of the channel. That was a very awkward position. Again, she had a tug ahead, and directly she ported her helm her tug would have to

1911

THE EZARDIAN.

Bargrave Deane J.

get on the starboard bow and tow to starboard. She could not let the tug out until after she had cleared the float, and the evidence satisfies me that, as soon as the tug cleared the float, the tug got out as soon as she possibly could on the starboard bow. Then it is said that the speed of the *Lloyd* is a matter of blame. Once she got the tug out on the starboard bow she could not go fast. She would have overrun the tug and she was obliged to adopt the speed of the tug. As it was the tug nearly got girted. The collision was entirely caused by the *Ezardian* trying to press on and pass the *Lloyd* at that particular place at a time when she must have known that the state of the tide was causing a cross eddy, and rendering the navigation of the *Lloyd* difficult. The fact that the *Lloyd* was sunk shews that there was speed on the *Ezardian*.

Counsel for the defendants said something about blowing four short blasts. I do not think there was time for the *Lloyd* to blow four short blasts. She was going ahead, hoping the tug would pull her round until the rope broke, and then I think the time was too short.

The *Ezardian* ought to have slowed, so as not to be at the place where she was at the critical time. I hold the *Ezardian* alone to blame.

Solicitors for plaintiffs, the owners of cargo lately laden on board the *Lloyd*: *Stokes & Stokes*.

Solicitors for defendants, the owners of the *Ezardian*: *Pritchard & Sons, for A. M. Jackson & Co., Hull.*

T. L. M.

[IN THE COURT OF APPEAL.]

C. A. 1911 *Feb.* 17.

SANDERS *v.* SANDERS.

Divorce—Practice—Wife's Costs—Successive Petitions by Husband—Vexatious Proceedings—Dismissal of First Petition with Costs—Non-payment by Husband—Stay of Proceedings on Second Petition.

A husband's petition for divorce having been dismissed with costs, which had been taxed, and part of which remained unpaid, the husband filed a second petition for divorce, the adultery alleged in the second petition being prior in date to the filing of the first petition but with different co-respondents:—

Held, that all proceedings in the second petition ought to be stayed until the husband had paid the wife's costs of the first petition.

Adultery with a different co-respondent is not a different cause of action.

Kemp-Welch v. *Kemp-Welch*, [1910] P. 233, applied.

Yeatman v. *Yeatman*, (1869) 39 L. J. (P. & M.) 37, overruled.

Appeal from an order of the President.

On June 17, 1909, a husband filed a petition against his wife for dissolution of marriage, alleging that the respondent had committed adultery with one Treadwell; and further that during the month of March, 1907, the respondent had committed adultery at 1, St. Julian's Road, Kilburn, with a man whose name and address were unknown to the petitioner. This petition was heard in July, 1910, and after a hearing of several days was dismissed with costs. The respondent's costs of the petition were duly taxed, and by orders dated respectively February 2, 1910, and November 2, 1910, the petitioner was ordered to pay these costs to the respondent. The petitioner had given the usual security for the wife's costs, but after deducting the amount paid under that security there was still due to the respondent under these orders a sum of 44*l.* odd, which the petitioner alleged he was entirely unable to pay. On December 7 1910, the husband filed a second petition against his wife for dissolution of marriage. This petition alleged that in the month of February, 1906, the respondent had at 235, Maida Vale committed adultery with one Hurst; that in and between the months of February, 1906, and October, 1907, Hurst had visited the respondent at 235, Maida Vale and 1, St. Julian's Road, and

C. A. 1911

SANDERS v. SANDERS.

on divers such occasions had committed adultery with her. The petition also alleged acts of adultery with a man named Austin between the months of June, 1907, and February, 1909, and it further alleged that during the year 1906 at 235, Maida Vale, and during the year 1907 at 1, St. Julian's Road, the respondent had committed adultery with divers men whose names were unknown to the petitioner.

At the hearing of the former petition the respondent in cross-examination was confronted with Hurst, who was in Court, and was questioned as to whether she had committed adultery with him, but she absolutely denied the charge.

The respondent took out a summons asking that all proceedings upon the second petition might be stayed until the costs of the previous petition had been paid. The registrar refused the application, and his refusal was affirmed by the President.

The respondent appealed.

Grazebrook, for the appellant. This case is covered by the principle of *Kemp-Welch* v. *Kemp-Welch*. (1) The learned President held that that case did not apply because here there were different co-respondents in the two petitions, and he relied upon *Yeatman* v. *Yeatman* (2); but it does not appear from the report of that case whether the adultery alleged in the second petition was or was not subsequent to the date of the first petition. Here no adultery was alleged subsequent to the date of the previous petition and all the charges might have been dealt with on that petition. Further, the charge against the unknown man in the first petition obviously relates to Hurst, who was made a co-respondent to the second petition. This appears from the proceedings at the hearing of the first petition. The rule of the Divorce Court that the husband must pay the wife's costs of defending a divorce suit rests upon principle, because otherwise the wife would have great difficulty in conducting her case. Rule 158 requires the husband to give security for the wife's costs of defending an existing suit, but this case is a fortiori because the difficulty which the wife will

(1) [1910] P. 233. (2) 39 L. J. (P. & M.) 37.

be put to in obtaining a solicitor to conduct her case will be increased by the fact that her solicitor has not been paid the costs of the previous petition.

J. I. Macpherson, for the respondent. This case is covered by the considered judgment of Lord Penzance in *Yeatman* v. *Yeatman* (1), which lays down that adultery with a different co-respondent constitutes a different cause of action. That case has been referred to with approval by Gorell Barnes J. in *Abdy* v. *Abdy*. (2) *Kemp-Welch* v. *Kemp-Welch* (3) is distinguishable because in that case there was an abortive trial and the suit was being proceeded with by the husband. That decision was based upon r. 158, which refers only to the costs of a pending litigation.

[FLETCHER MOULTON L.J. At common law a second action of ejectment will be stayed until the costs of the first action are paid where the lands are held under the same title although the parties are not precisely the same and although the lands are not the same. That is an analogous case.]

Grazebrook, in reply, referred to *Peters* v. *Tilly* (4); *Christian* v. *Christian* (5); *Joseph* v. *Joseph*. (6)

COZENS-HARDY M.R. This is an appeal from the refusal of the President to stay proceedings in a pending action until the costs of the appellant of a former proceeding had been paid. The appellant here is the wife and the respondent is the husband. The relation of husband and wife in matters of litigation in the Divorce Court is very special and very peculiar. I do not propose to repeat what I said in *Kemp-Welch* v. *Kemp-Welch* (3), but it is impossible to read the judgments of the Court of Appeal in that case without seeing that every member of the Court adopted the view that Brett L.J. (in the case of *Robertson* v. *Robertson* (7)) was perfectly right when he said that it was a matter of high policy and high propriety that the husband should pay the wife's costs of defending a proceeding against her in the Divorce

(1) 39 L. J. (P. & M.) 37.
(2) (1896) 12 Times L. R. 524.
(3) [1910] P. 233.
(4) (1886) 11 P. D. 145.
(5) (1897) 78 L. T. 86.
(6) (1897) 76 L. T. 236.
(7) (1881) 6 P. D. 119.

C. A. 1911

SANDERS v. SANDERS.

Cozens-Hardy M.R.

Court, and, although there was no rule precisely applicable to the case there, we thought it right and proper to apply the principle laid down by Brett L.J. by staying proceedings until the wife's costs, which had been ascertained, and which the husband had been ordered to pay, had been paid. It is quite true that in that case there was an abortive trial and that the case was being proceeded with by the husband, but we there ordered all further proceedings to be stayed until the husband had found security for or paid the wife's ascertained costs. Here the facts are slightly different, but in my opinion the principle of *Kemp-Welch* v. *Kemp-Welch* (1) applies. There was a first petition presented by the husband against his wife alleging that in October, 1908, she had committed adultery with one Treadwell, and that in March, 1907, she had committed adultery with a man unknown. That petition came on for hearing and was dismissed with costs. The husband says he is quite unable to pay those costs. Being unable to pay, he presents a second petition alleging that the wife had committed adultery with (amongst other people) one Hurst at 1, St. Julian's Road, which was the address mentioned in the former petition, and the period of the charges of adultery in the second petition is covered by the previous petition. In the present suit he condescends upon Hurst, and it is said by counsel for the wife that the charge against Hurst was brought before the Court on the last occasion, Hurst being in Court and the wife being asked in cross-examination "Have you not committed adultery with Hurst, and is not that the man?" Now the husband names Hurst as having committed adultery with her at the same place. In my opinion this is a case in which we certainly ought to apply the principle which we emphatically laid down in *Kemp-Welch* v. *Kemp-Welch* (1) and say that the husband ought not to be allowed to carry on his second petition until he has paid the costs of the former petition. I am aware it may be said with perfect propriety that we are not following the decision of Lord Penzance in *Yeatman* v. *Yeatman.* (2) The case is very shortly reported, but the learned Lord appears to have said that adultery

(1) [1910] P. 233.

(2) 39 L. J. (P. & M.) 37.

with a different co-respondent was a different cause of action. With great respect I am not prepared to say that it is. I think that the analogy of an action of ejectment referred to by Fletcher Moulton L.J. is very close. The rule is that a second action of ejectment will be stayed until the costs of a former action have been paid, even though the first action relates to a different piece of land from that which is the subject-matter of the second, if the lands are held by the same title. It is only necessary to refer to *Keene* v. *Angel* (1) in support of that. In my opinion we should not be administering justice as it ought to be administered between husband and wife if we did not say that the husband must pay these costs before allowing him to go on with this suit.

FLETCHER MOULTON L.J. I am of the same opinion. This is in truth an a fortiori case when compared with the *Kemp-Welch Case.* (2) I will only call attention to one matter in this connection. I find that in the former petition there was an allegation that during the month of March, 1907, the respondent committed adultery at 1, St. Julian's Road, Kilburn, with a man whose name and address are unknown to the petitioner, and in the second petition there is an allegation that during the year 1907 at 1, St. Julian's Road the respondent committed adultery with divers men whose names are unknown to the petitioner. So that there is in the second petition an allegation which covers exactly the allegation to which I have called attention in the first petition. Therefore, on the narrowest interpretation of the common law rule as applied to ejectments, a person would not in such circumstances be allowed to litigate over again his right to relief without paying the costs of the former action. Indeed this second petition is open to the objection that it may be a case of bis vexatri, and in these circumstances it is only right that the costs of the former proceedings should be paid as a condition precedent to its being allowed to go on. But further I think that, if you consider the principle upon which the wife's costs are dealt with in the Divorce Court, as interpreted in *Kemp-Welch* v. *Kemp-Welch* (2), the reasoning and the justice of the rule apply

(1) (1796) 6 T. R. 740. (2) [1910] P. 233.

C. A. 1911

SANDERS v. SANDERS.

Fletcher Moulton L.J.

to the present case. It would be a gross injustice if a man were allowed to bring petition after petition alleging acts of adultery, all of which might have been tried in the first petition, without paying the costs to which he has put his wife in the previous petitions. The acts of adultery alleged in the second petition are all prior to the filing of the first petition. There is no question of adultery subsequent to the date of the first petition. All the allegations therefore relate to matters which might have been dealt with by the first petition. Under these circumstances I am satisfied that, whether this is an extension of the rule or not, justice requires that payment of these costs of the first petition should be a condition precedent to the further continuance of these proceedings.

BUCKLEY L.J. In the Divorce Court the rule is that the wife, even though she be respondent, is entitled to defend herself at the expense of the husband, and that, whether the defence ultimately succeeds or fails. In the case of a pending proceeding that is dealt with by r. 158—a rule which I agree does not apply here. Here the first petition has failed and the wife is entitled to receive her taxed costs of that. Those costs have been taxed and a sum is now due to her. A second petition has been filed, and the question now is whether we should stay proceedings on this petition until the costs due on the former petition have been paid. Had this been a further step in the proceedings on the first petition *Kemp-Welch* v. *Kemp-Welch* (1) and r. 158 would have applied. This case appears to me to be a fortiori. It is said that the cause of action on the second petition is a different cause of action because different co-respondents are named. I am unable to follow that. As between husband and wife the cause of action is that adultery has been committed by the wife, but to establish the cause of action evidence must be given that adultery was committed with a particular person. Adultery with A. and adultery with B. do not constitute different causes of action. The cause of action is the same though the evidence to support the cause of action is evidence of adultery with A. or

(1) [1910] P. 233.

with B. as the case may be. *Abdy* v. *Abdy* (1) illustrates this. There Gorell Barnes J. said: "It was clear from the case of *Yeatman* v. *Yeatman* (2) that an application to stay proceedings on the ground that the costs of a former suit were unpaid could not succeed unless the cause of action in the former suit was the same as in the case in which the application was being made. In this case the causes of action were not identical, for in the former suit the cause of action was adultery and in the present one desertion." Those are different causes of action, but I cannot see that adultery is a different cause of action if committed with a different man. In the Divorce Court the wife is entitled to defend herself at her husband's expense. If he has not paid the wife's costs of the first petition she is put in greater difficulty in defending the second petition, for if she has not paid her own solicitor in the first petition how is she likely to get a solicitor to act for her in the second petition? I think the appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *Pierron & Ellis.*
Solicitor for respondent: *W. V. Reeve.*

(1) 12 Times L. R. 524. (2) 39 L. J. (P. & M.) 37.

H. B. H.

1911
Jan. 30;
Feb. 6, 13.

In the Estate of CUNIGUNDA (Otherwise CORA) CRIPPEN, Deceased.

Probate — Practice — Administration — "Special Circumstances"—Court of Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 73—*Husband and Wife—Murder of Wife by Husband—Evidence—Effect of Conviction as Evidence —Res inter alios acta—Legal Personal Representative of Husband passed over—Grant to Next of Kin of Wife.*

A certified copy of the conviction of a husband for the murder of his wife is admissible in evidence against him in a civil proceeding inter alios acta, and is admissible not merely as proof of the conviction, but also as prima facie evidence of the commission of the crime.

The conviction of a husband of the murder of his wife—

Held to be a "special circumstance" within the meaning of s. 73 of the Court of Probate Act, 1857; and the Court passed over the legal personal representative of the husband and granted administration to the estate of the intestate wife, upon the application of one of her next of kin.

Dictum of Bramwell L.J. in *Leyman* v. *Latimer*, (1878) 3 Ex. D 352, doubted.

Yates and Others v. *Kyffin-Taylor and Wark*, [1899] W. N. 141, disapproved.

Motion for a grant of administration in respect of the estate of an intestate wife, passing over the legal personal representative of her husband, who survived her.

Cunigunda (otherwise Cora) Crippen died on or about February 1, 1910, leaving Hawley Harvey Crippen, her lawful husband, her surviving.

On October 22, 1910, the husband was found guilty of the wilful murder of his wife and sentenced to death.

On November 8, 1910, he made his will, and appointed Ethel Clara Le Neve sole executrix and universal legatee. A caveat was entered in the husband's estate, but, on the same being warned, no appearance was entered to the warning.

The wife's next of kin were Theresa Hunn, a sister of the whole blood, and three sisters and two brothers of the half blood.

Harold Otto Seyd, as attorney of Theresa Hunn, moved for a grant of letters of administration in respect of the estate of the wife.

The notice of motion, which was dated January 20, 1911, was served on the solicitors for the executrix of the husband.

W. O. Willis, for the applicant. The present case is unlike any case previously decided. It is submitted that the grant should be made to some one other than the representative of the husband, e.g., the wife's sister. The husband's representative, if and when constituted, is not entitled to participate in the wife's estate in the present case, as it is contrary to public policy that his estate should benefit by his crime. As a general rule the grant is made according to interest, but the case of *Cleaver and Others* v. *Mutual Reserve Fund Life Association* (1) establishes that the beneficial interest in the wife's estate cannot in the present circumstances go to the husband's estate or his representative, as such a grant would be contrary to public policy.

Durley Grazebrook, for the executrix of the husband's will. In the first place the affidavit of the applicant does not specify where the property the subject of the application is. Some of the property in the hands of the police at Scotland Yard never did belong to the wife, but the applicant appears, from his affidavit, to be claiming the whole of such property as well as money in the bank. Unless and until the applicant (representing one of the wife's next of kin) has conclusively proved, by admissible evidence, the fact of the wilful murder of the wife by the husband, he cannot oust the legal personal representative of the husband, i.e., the executrix of his will, in obtaining probate, nor prejudice or prejudge the rights of the husband's legal personal representative, whatever those rights might be. The affidavit of the applicant is altogether insufficient, and is for the greater part hearsay and quite inadmissible; but even the duly certified copy of the husband's conviction cannot be received in these or any civil proceedings for the purpose of proving that the testator murdered his wife. (2) In the case of *Cleaver and Others* v. *Mutual Reserve Fund Life Association* (3) the question as to

(1) [1892] 1 Q. B. 147.

(2) *Yates and Others* v. *Kyffin-Taylor and Wark*, [1899] W. N. 141.

(3) [1892] 1 Q. B. 147; and see Lord Esher M.R. at p. 151.

1911

CRIPPEN, IN THE ESTATE OF.

whether the conviction of Mrs. Maybrick was admissible, or, if admissible, conclusive evidence of the murder of Mr. Maybrick, was never really argued: it was a case of contract, the consideration for which had been received by the persons who were endeavouring to avoid liability at the suit of the legal personal representatives of the other contracting party.

The old law, speaking generally, was that felons were intestable (1); but, later, even before the statute to abolish forfeitures for treason and felony (2), the executor of the will of a convicted person was entitled to probate thereof, though the effect of the verdict was to cause a forfeiture of the property of the deceased to the Crown. (3) However, since 1870, there are no forfeitures on conviction; and it would seem that the only disqualifications arising from convictions for felony are in respect of the holding of certain offices; and the restrictions on alienation of property are aimed at the alienation by the convict in his lifetime. But even if there were admissible and conclusive evidence before this Court that the man murdered his wife, he has suffered his punishment; he has paid the extreme penalty; and a person convicted of felony, after enduring the punishment, is in law no longer a felon. (4)

A will speaks only from the death, and in law the husband, at the moment when he expiated his crime on the scaffold, was no longer a felon: his will from that moment became operative. The executrix is entitled to probate. As his legal personal representative, she is entitled, on taking probate, to apply for a grant of administration to the estate of the husband's deceased wife, unless there is before the Court, at the time of such application, admissible evidence clearly proving that she has no such title; in other words, that he had none.

W. O. Willis in reply.

1911. Feb. 13. SIR SAMUEL EVANS, PRESIDENT. By this motion an application is made for a grant of letters of

(1) Godolphin's Orphan's Legacy, 3rd ed., pt. i., ch. xii., pp. 35 et seq.
(2) (1870) 33 & 34 Vict. c. 23.
(3) *In the Goods of Bailey*, (1861) 2 Sw. & Tr. 156.
(4) *Leyman* v. *Latimer and Others*, 3 Ex. D. 352.

administration of the estate of Cunigunda (otherwise Cora) Crippen, deceased, to the attorney of her sister, Mrs. Hunn.

The deceased met with her death on February 1, 1910. She died intestate, leaving her husband, Hawley Harvey Crippen (now deceased), surviving her.

He made a will, dated November 8, 1910, appointing Ethel Le Neve his executrix and universal legatee.

This executrix opposes the application which is now being made, and claims that the grant of letters of administration should be made to her as the personal representative of the said Hawley Harvey Crippen, deceased.

The circumstances can be shortly stated under a few dates.

On October 22, 1910, the said Hawley Harvey Crippen, upon an indictment charging him with the wilful murder of his wife, the deceased intestate, was found guilty and was sentenced to death.

He appealed to the Court of Criminal Appeal.

On November 5, 1910, his appeal was dismissed and the verdict and sentence were affirmed.

Three days later, on November 8, 1910, he made his will, appointing Ethel Le Neve executrix and universal legatee.

On November 23, 1910, the sentence of death was carried out, and he was duly executed for the murder of his said wife.

By s. 73 of the Court of Probate Act, 1857 (1), this Court has a discretion (which of course must be judicially exercised), by reason of special circumstances, to appoint such person as the Court shall think fit to be administrator of the personal estate of a deceased intestate, in lieu of the person who would otherwise be by law entitled to the grant of administration.

In the present case a man who has been convicted of the wilful murder of his wife has, after his conviction, made a will appointing a person his executrix and universal legatee, who claims, as such executrix, to administer the murdered wife's estate, and as legatee to be entitled to the murdered wife's property.

These are, surely, "special circumstances."

I therefore pass over and decline to appoint the executrix; and

(1) 20 & 21 Vict. c. 77.

1911

CRIPPEN, IN THE ESTATE OF.

The President.

I appoint the applicant as attorney of the deceased woman's sister to be administrator of the deceased woman's estate on the sister's behalf.

If I am right in this exercise of the discretion of the Court, there remains nothing which it is necessary for me to decide upon this motion.

But in case it should be determined that I ought to decide the points raised in argument before exercising my discretion, I will shortly state my views upon them.

It was argued before me, on behalf of the executrix, Ethel Le Neve, that I was bound to give her the grant of administration, because the conviction of her testator not only did not prove that he was guilty of the murder, but could not be admissible at all as evidence of the commission of the crime.

It is clear that the law is, that no person can obtain, or enforce, any rights resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such rights. (1) The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence.

The proposition argued was, that a judgment of conviction in a criminal prosecution like the one in question cannot be received, in a civil action or matter, as any evidence to establish the truth of the facts on which it was rendered, and that it is not admissible at all for that purpose.

The case of *Yates and Others* v. *Kyffin-Taylor and Wark* (2) was cited. That was a decision of the Vice-Chancellor of the County Palatine of Lancaster. I cannot find that this case was carried to the Court of Appeal. Unless it was affirmed on appeal, it is not binding on this Court.

A passage from the judgment of Bramwell L.J. in *Leyman* v. *Latimer and Others* (3) was relied on. It runs thus: "It is plain from the numerous authorities cited in 2 Taylor on Evidence, pt. iii., ch. iv., par. 1693, p. 1416 (7th ed.), that a conviction for felony is *res inter alios acta*, and of itself is no evidence in any civil proceeding that the person convicted has

(1) *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q. B. 147.

(2) [1899] W. N. 141.

(3) 3 Ex. D. 352, at p. 354.

committed felony." The decision in the case did not rest upon this ground; and the case is not referred to at all in any of the subsequent editions of Taylor on Evidence; nor in the notes to the leading authority of the *Duchess of Kingston's Case.* (1)

With great deference to the high authority of Lord Bramwell, I venture to doubt whether the authorities cited in Taylor on Evidence (ubi supra) support his proposition. Those authorities are the following:—*Smith* v. *Rummens* (2); *Hathaway* v. *Barrow* (3); *Blakemore* v. *Glamorganshire Canal Co.* (4); *Justice* v. *Gosling* (5); *Jones* v. *White* (6); *Hillyard* v. *Grantham* (7); *Gibson* v. *McCarty* (8); *Helsham* v. *Blackwood* (9); *Wilkinson* v. *Gordon* (10); *Jameson* v. *Leitch.* (11) Many of these cases were decided (and others followed the decisions) on narrow and special grounds when the laws of evidence were very different from what they now are, e.g., on the ground that to admit the conviction as evidence, where it had been obtained wholly or partly on the information or evidence of a party who was afterwards interested in the civil case, would be to allow the party in the civil case to swear in his own cause, in breach of the rule then in force, which Sir John Nicholl (in one of the cases cited) described as "that salutary maxim which prohibits parties to suits from giving evidence for themselves."

Reliance was also placed on a passage in the opinion of the judges (per Blackburn J.) delivered to the House of Lords in *Castrique* v. *Imrie* (12) which is as follows: "A judgment in an English Court is not conclusive as to anything but the point decided, and therefore a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery in an action on the bill, though

(1) 2 Smith's Leading Cases, 11th ed., pp. 731, 732.
(2) (1807) 1 Camp. 9.
(3) (1807) 1 Camp. 151.
(4) (1835) 2 C. M. & R. 139.
(5) (1852) 21 L. J. (C.P.) 94.
(6) (1717) B. N. P. 233; 1 Str. 68.
(7) (1750) cited (Lord Hardwicke) in *Brownsword* v. *Edwards,* 2 Ves. Sen. 246.
(8) (1736) Cas. temp. Hardwicke, 311; cited in 11 C. B. at p. 124.
(9) (1851) 20 L. J. (C.P.) 187; 11 C. B. 111.
(10) (1824) 2 Addams Ecc. 152 (Sir J. Nicholl).
(11) (1842) Milw. Ecc. R. (Ir.) 683, at p. 688.
(12) (1870) L. R. 4 H. L. 414, at p. 434.

1911

CRIPPEN, IN THE ESTATE OF.

The President.

the conviction must have proceeded on the ground that the bill was forged." The decision in that case was upon a wholly different question. The passage referred to is an illustration of a case where a conviction being res inter alios acta might be properly excluded—e.g., it may well be that in an action by A. against B., on a bill of exchange, a conviction of C. for forgery of the bill would not be admissible in evidence.

In my opinion the question raised before me, or the question which might arise in this very matter in another Court, in an action relating to the property of the deceased intestate is a different one.

Here the representative of a convicted felon claims to be entitled to administration of an estate because she claims to be entitled to the estate itself—the only claim to the estate being one which results from the felon's crime.

In another Court, she might bring an action to recover the estate from the administrator whom I now appoint.

It is exactly the same as the case of the felon himself making the claim, or bringing the action. Would not the fact of his conviction be evidence against him? Would it be right to treat it as res inter alios acta, and to say it was not admissible at all in a civil action brought by him?

The complete maxim is "Res inter alios acta alteri nocere non debet." There is no question of "alteri nocere" here.

I think, rather, that the matter should be decided upon the following principle, which was laid down by the judges in the *Duchess of Kingston's Case* (1): "What has been said at the bar is certainly true, as a general principle, that a transaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the Court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers."

(1) 2 Smith's Leading Cases, 11th ed., pp. 731, 732.

1911

CRIPPEN, IN THE ESTATE OF.

The President.

In the present day a person before he can be convicted is "admitted to make a defence, to examine witnesses, and to appeal from a judgment he may think erroneous"—and it may be added, to give evidence in his own behalf.

In these circumstances I think the maxim "Omnia præsumuntur rite esse acta" ought to apply. In some cases, e.g., in the case of a finding of a jury acting pursuant to a commission in lunacy, the presumption of law is that the verdict of the jury was well founded. (1) I am aware that in such a case the state of mind, and not the commission of a particular act, is in question; but I see no reason why the analogy should not be followed in a criminal case.

If it be that the rules of evidence ever were as contended for the executrix in this regard, I think, in the circumstances attending trials for crimes in these days, that they ought to be reconsidered and revised.

In my opinion, where a convicted felon, or the personal representative of a convicted murderer who has been executed, brings any civil proceeding to establish claims, or to enforce rights, which result to the felon, or to the convicted testator from his own crime, the conviction is admissible in evidence, not merely as proof of the conviction, but also as presumptive proof of the commission of the crime.

Solicitors for applicant: *Robert Seyd & Co.*

Solicitors for executrix of the husband: *Hopwood & Sons.*

(1) *Prinsep and the East India Company* v. *Dyce Sombre and Others*, (1856) 10 Moo. P. C. 232, at p. 244.

H. D. G.

NOTE BY THE PRESIDENT.

After this judgment was reported in the Times Law Reports, Mr. Graham Hastings, K.C., kindly wrote to me calling my attention to a case which arose in connection with Palmer, the Rugeley murderer, in which a similar point was decided by Lord Romilly M.R. in 1858. There the verdict was one of a coroner's jury. The case is *The Prince of Wales, &c., Association Company* v. *Palmer*, and is reported in 25 Beavan, 605.—S. T. E.

1911
April 3.

THE MUDLARK.

Admiralty—Ship—Collision — Limitation of Liability—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 503, 742—*Hopper Barge.*

A hopper barge, used for dredging purposes, with a rudder, but without means of propulsion, and when under way, towed to and from her destination, is a "ship" within the meaning of s. 742 of the Merchant Shipping Act, 1894, and her owners are entitled to limit their liability under s. 503 of the same Act.

The Mac, (1882) 7 P. D. 126, followed.

Action of Limitation of Liability.

The plaintiffs were Anthony Fasey & Son, owners of the hopper barge *Mudlark*, or, alternatively, charterers to whom the *Mudlark* was demised. (1)

The defendants were the owners of the steamship *Ripon*, and the goods, merchandise, and other things on board of her, and the North Eastern Railway Company, and Irvines' Shipbuilding and Dry Dock Company, Limited, and all and every person or persons whatsoever claiming or being entitled to claim in respect of damage or loss caused by the improper navigation of the vessel *Mudlark*.

The case is reported on the question whether the *Mudlark*, for the purposes of limitation of liability, came within the meaning of the word "ship" in ss. 503 and 742 of the Merchant Shipping Act, 1894. (2)

(1) By the Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 71, "Sections 502 to 509 of the principal Act (M. S. A., 1894) shall be read so that the word 'owner' shall be deemed to include any charterer to whom the ship is demised."

(2) 57 & 58 Vict. c. 60:

Sect. 503. "The owners of a ship, British or foreign, shall not where all or any of the following occurrences take place without their actual fault or privity; (that is to say), ...

"(*d*) where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship;

be liable to damages beyond the following amounts; (that is to say), ...

"(ii.) in respect of loss of, or damage to, vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount

1911

THE MUDLARK.

The *Mudlark* is a sea-going steel hopper barge, 90 feet in length and 19 feet 6 inches beam, carrying two hands, and provided with a rudder. She is used for dredging purposes and fitted with a double bottom. She has no means of propulsion, but her owners employ a tug to take her to and from her destination when carrying dredged materials to sea for the purpose of discharging them. She carries anchors and chains and navigation lamps, and has a closed in forecastle. She is of 109·43 tons gross and 106·43 tons net register, and belongs to the port of London.

On January 25, 1910, whilst moored in the harbour of West Hartlepool, the *Mudlark* broke adrift, and came into collision with the starboard quarter mooring ropes of the steamship *Ripon*, causing the mooring ropes to part, in consequence of which the *Ripon*—which was lying, for the purpose of repair, in the harbour alongside the quay belonging to Irvines' Shipbuilding and Dry Dock Company, Limited—carried away most of her other moorings, and damaged herself and the quay wall, and the caisson of the dry dock, and other property, and was eventually scuttled in order to avoid doing or receiving further damage. There was no loss of life or personal injury caused by the collision and damage.

The collision and damage were caused by the improper navigation or management of the *Mudlark*; but without the actual fault or privity of the plaintiffs.

On April 23, 1910, an action was instituted in the Probate, Divorce, and Admiralty Division (Admiralty) of the High Court of Justice, on behalf of the owners of the steamship *Ripon*, against Anthony Fasey & Son, the plaintiffs in the present action, to recover the amount of the damage sustained by the *Ripon* in consequence of the collision. The above-named plaintiffs entered an appearance in the action, and on December 15, 1910, judgment

---

not exceeding eight pounds for each ton of their ship's tonnage."

Sect. 742. "In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them, that is to say—

. . . . .

"'Ship' includes every description of vessel used in navigation not propelled by oars."

1911

THE MUDLARK.

was given therein, and a decree was made pronouncing in favour of the claim of the plaintiffs in the action, and condemning the defendants therein in the amount of the damage and costs, and referring such damage to the registrar assisted by merchants to report the amount thereof.

The plaintiffs, having reason to believe that other claims might be brought against them in respect of loss or damage to the *Ripon*, or other property, and that the claims would exceed the aggregate amount of 8*l.* per ton on the tonnage of the *Mudlark* ascertained in accordance with the provisions of the Merchant Shipping Acts, 1894 to 1906, were now willing and offered to pay into Court the sum of 875*l.* 8*s.* 10*d.*, being the aggregate amount of 8*l.* per ton on the tonnage of the *Mudlark*, namely, 109·43 tons, together with interest thereon at the rate of 4 per cent. per annum from the date of the collision until payment, and the plaintiffs claimed: (1.) judgment that the plaintiffs and the *Mudlark* were not answerable in damages to an aggregate amount exceeding 8*l.* per ton; (2.) a declaration that the tonnage of the *Mudlark* was 109·43 tons, and that the aggregate amount of the plaintiffs' liability was 875*l.* 8*s.* 10*d.* together with interest, and no more; (3.) liberty to pay into Court the sum of 875*l.* 8*s.* 10*d.* and interest; (4.) directions for ascertaining the persons who might have any just claim in respect of the collision; and (5.) distribution of the sum paid into Court rateably among the several persons who made out their claims.

By their defence the defendants, the owners of the steamship *Ripon*, and Irvines' Shipbuilding and Dry Dock Company, Limited, did not admit (inter alia) that, in respect of the *Mudlark*, for the purposes of limitation of liability, the plaintiffs were the owners of a registered British ship.

April 3. *Dawson Miller*, for the plaintiffs. The owners of the *Mudlark* are entitled to limit their liability under s. 503 of the Merchant Shipping Act, 1894, for the dredger comes within the definition of "ship" in s. 742 of the same Act, as she is a "vessel used in navigation not propelled by oars." She is a sea-going vessel with a rudder, and it is not material that she has no means of

propulsion and that she is ordinarily towed. In *The Mac* (1) the Court of Appeal (Lord Coleridge C.J., Brett and Cotton L.JJ.) reversed the decision of Sir Robert Phillimore (2), and held that a hopper barge not furnished with any means by which she could be propelled, and used for dredging purposes, was a "ship" within the meaning of s. 458 of the Merchant Shipping Act, 1854. The definition of the word "ship" in s. 2 of that statute is the same as in s. 742 of the present Act of 1894. The effect of the interpretation clause is not to limit the meaning, but to enlarge it: see per Brett L.J. in the above case. (3)

C. Robertson Dunlop, contra. The case of *The Mac* (1) was decided under the repealed Merchant Shipping Act, 1854, in respect of another matter, namely, the jurisdiction of justices in awarding salvage. There is no decision, under the Act of 1894, that a hopper barge without means of propulsion, and employed for dredging only, is a "ship" for the purposes of limitation of liability.

BARGRAVE DEANE J. I think I am bound to follow the case of *The Mac* (1) in the Court of Appeal, and hold that the *Mudlark* is a "ship" within the meaning of s. 742 of the Merchant Shipping Act, 1894, and that her owners are, therefore, entitled to limit their liability under s. 503 of the same Act. There will be the usual decree.

Solicitors for plaintiffs, owners of the *Mudlark*: *Crossman, Prichard, Crossman & Block, for H. W. Bell, West Hartlepool.*

Solicitors for defendants, the owners of the *Ripon*, and Irvines' Shipbuilding and Dry Dock Company, Limited: *Downing, Handcock, Middleton & Lewis, for Bolam, Middleton & Co., Sunderland.*

(1) 7 P. D. 126. (2) 7 P. D. 38.

(3) 7 P. D. 130.

T. L. M.

1911
March 13.

JINKS *v.* JINKS.

Divorce—Practice—Wife's Petition for Judicial Separation—Costs of Wife—Change of Solicitor—Bill of Costs—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37—*Resumption of Cohabitation—Application to dismiss Petition, both Parties concurring—Opposition of former Solicitor of Wife—Refusal to dismiss Petition—Jurisdiction of Court—Remedy.*

A wife, petitioner in a suit for judicial separation, cannot, by merely giving notice of change of solicitors, deprive the solicitor who has hitherto represented her in the suit of his right to carry in his bill and tax his costs in the Divorce Division, so as to compel him to have recourse to an action at common law against the husband for necessaries.

Where the parties to a matrimonial suit have returned to cohabitation, a solicitor who has acted for the wife is entitled to object to an order for dismissal of the petition unless provision is made for his costs, and the proceedings may be stayed, pending the carrying in of his bill and the taxation of his costs.

The reasonableness of the items in the bill can be discussed and dealt with by the taxing officer upon the taxation in the Divorce Division.

This was a summons which came before the President in chambers on March 6, 1911, and was adjourned into Court for argument and heard on March 13, 1911.

The summons was taken out by the husband, the respondent in the suit, asking that the petition of his wife for judicial separation might be dismissed. The application was made with the concurrence and approval of the wife, and was supported by her; but it was opposed by Mr. H. Vaughan Whitehead (who formerly acted as solicitor for the wife in the suit) on the ground that his costs had not been paid and ought to be provided for.

On September 14, 1910, the wife filed a petition, praying for a judicial separation on the ground of her husband's alleged cruelty.

On October 7, 1910, on the husband's application, an order was made for particulars of the allegations of cruelty to be delivered within fourteen days; and the husband was given fourteen days further time to file his answer after the delivery of the particulars. This order was never, in fact, complied with, no particulars being delivered.

On October 26, 1910, an application was made on behalf of the

wife, asking for an injunction restraining the husband from removing the children, and an order was made accordingly.

On October 31, 1910, a summons was taken out on behalf of the husband, asking that the injunction granted on October 26 might be discharged, and also asking for custody of the children; this was adjourned for a week on the application of Mr. Bartley Denniss, who then represented the wife, the ground put forward being that time was required to reply to the affidavits filed on behalf of the husband, whose case was that his wife intended to return to him. During the interval the husband and wife did in fact resume cohabitation.

On November 8, 1910, a summons was taken out on behalf of the husband asking for the petition to be dismissed. Mr. H. Vaughan Whitehead, who was then still on the record as the wife's solicitor, attended before the registrar and opposed the application unless his costs were provided for, and, in the result, no order was made.

On December 15, 1910, an application was made, ex parte, on behalf of the wife, who had again left her husband shortly before that date, asking for an injunction restraining the husband from removing the children out of the jurisdiction, and an order was made accordingly.

On December 16, 1910, an order for alimony pendente lite was made by the registrar.

On December 19, 1910, on the application of the husband, the injunction granted ex parte on December 15 was dissolved, mutual undertakings being given on behalf of both parties.

On December 21, 1910, notice of change of solicitors was given by the wife's present solicitors, and was duly served on the same day on Mr. H. Vaughan Whitehead, the wife's former solicitor, and on the solicitors for the respondent.

On January 10, 1911, a signed bill of costs was sent by Mr. Whitehead to the wife's present solicitors, but about January 31 this was returned by them; and on February 1, 1911, the same bill of costs was forwarded by Mr. Whitehead to the husband.

On February 24, 1911, a summons was taken out on behalf of the wife, asking for the petition to be dismissed; the husband

1911

JINKS v. JINKS.

and wife having in fact resumed cohabitation about the middle of February. Mr. Whitehead appeared at the hearing of the summons, although he had not been served with notice to attend; and, while not traversing the fact, objected to the petition being dismissed until his costs had been satisfied; and, in the result, the registrar made no order. Thereupon, after consultation with officials in the Divorce Registry, a summons on behalf of the respondent was taken out before the judge in chambers. This came on for hearing on March 6, 1911, and was adjourned into Court for argument.

March 13. *H. Durley Grazebrook*, for the husband (respondent), stated the facts, including the fact that the husband and wife were now living together.

J. R. Newton, for the wife (petitioner), concurred in the application.

[SIR SAMUEL EVANS, PRESIDENT. Is the fact of the resumption of cohabitation admitted?]

Bartley Denniss, for Mr. H. Vaughan Whitehead, the former solicitor for the wife.

Durley Grazebrook objected that the solicitor had no locus standi and could not be heard.

[SIR SAMUEL EVANS, PRESIDENT, overruled the objection.]

Bartley Denniss (for Mr. H. Vaughan Whitehead) opposed the application. He cited the cases of *Joseph* v. *Joseph and Burnhill* (1) and *Warwick* v. *Warwick*. (2) *Nairne* v. *Nairne* (3) is not in point in the present case; and the principle of the decision, that the object of ordering security to be given is to protect the wife and enable her to defend herself, and not to protect her solicitors, is overruled by *Kemp-Welch* v. *Kemp-Welch and Crymes* (4) and *Sanders* v. *Sanders, Hirst, and Austin*. (5)

In the present case Mr. H. Vaughan Whitehead, who was acting on behalf of the wife (petitioner), was proceeding with the suit on behalf of his client down to December 21, 1910, when

(1) (1897) 76 L. T. 236.
(2) (1901) 85 L. T. 173.
(3) (1901) 85 L. T. 649.
(4) [1910] P. 233, at p. 237.
(5) [1911] W. N. 46.

1911

JINKS v. JINKS.

she gave notice of change of solicitor, and the time had not arrived for carrying in his bill for taxation.

[SIR SAMUEL EVANS, PRESIDENT, referred to Divorce Rule 158.]

The former solicitor to the wife has the right to carry in his bill for taxation in the suit when the wife has changed her solicitor; and there has been no delay in the present case on his part.

The proper course for the former solicitor to adopt is what he has followed here, that is, to ask the wife and husband whether they are willing to pay what is due to him, without first going to the expense of taxation and obtaining an order.

Durley Grazebrook in reply. Mr. Vaughan Whitehead delivered a signed bill, under s. 37 of the Solicitors Act, 1843 (1), but the requisite period of a month before he can sue upon it had not expired when the summons for the dismissal of the petition was taken out before the registrar.

The cases of *Joseph* v. *Joseph and Burnhill* (2), *Warwick* v. *Warwick* (3), and *Cooper* v. *Cooper* (4) are quite different from the present case. This is not a case of the wife defending herself and of her being placed in funds for that purpose. It is not for the protection of the solicitor, but for the protection of the client, that orders for the wife's costs are made against the husband (5) and the solicitor has no greater right than his client to recover costs from the opposite party. (6)

The former solicitor must file his bill in this Division within a reasonable time after the change has been duly notified. *Nairne* v. *Nairne* (7) is directly in point; in fact, the present is an a fortiori case.

In the present case, the suit has been at an end since November, 1910. There is no case similar to the present one, and the former solicitor must be relegated to his common law rights. [He also cited *Cheale* v. *Cheale* (8) and *Nicol* v. *Nicol*. (9)]

(1) 6 & 7 Vict. c. 73.
(2) 76 L. T. 236.
(3) 85 L. T. 173.
(4) (1864) 3 Sw. & Tr. 392.
(5) *Walker* v. *Walker and Lawson*, (1897) 76 L. T. 234, at p. 236.
(6) *Russell* v. *Russell*, [1892] P. 152 (C. A.).
(7) (1901) 71 L. J. (P. & M.) 37.
(8) (1828) 1 Hagg. Eccl. 374.
(9) (1886) 31 Ch. D. 524, per Cotton L.J. at p. 526.

1911

JINKS v. JINKS.

SIR SAMUEL EVANS, PRESIDENT. This is an application on the part of the respondent for an order to dismiss the petition which was filed by his wife against him claiming a judicial separation on the ground of cruelty, and the question I have now to determine is whether I ought to dismiss that petition without ordering security for, or payment of, the costs of the wife's first solicitor. The solicitor for a wife can get his costs in one way or another if he is properly instructed and if he acted reasonably. The only question is whether in the circumstances of this case the taxation should rest with the officials in this Division; or whether an order should be made dismissing the former petition at once, which would have the effect of driving the wife's solicitor to a common law action for his charges. I do not know that there is any material difference in the result whichever course is taken, except, of course, the delay and cost of an action at law in the King's Bench Division.

The petition was filed on September 14, 1910; it is still on the file and the suit is still alive. The contention put forward on behalf of the husband is that the suit was practically at an end in the month of November last, but that cannot be so, for I have before me the Court minutes, and I find that on October 26 there was an order made in the suit calling upon the respondent to restore two of the children to the petitioner; on October 31 there was an order discharging the injunction; on December 15 there was a further order in the suit made ex parte in reference to two of the children, and on December 16 an order for alimony pendente lite; on December 19 there was another order, the effect of which was to discharge the order of December 15 on certain undertakings given by both parties. On December 21 notice of change of solicitors was given by the wife's present solicitors; that was duly served on that day upon the wife's former solicitor, Mr. H. Vaughan Whitehead, and also upon the solicitors for the husband. The result of that was that Mr. H. Vaughan Whitehead ceased to be the solicitor upon the record, and the petitioner was thereafter, and is still, represented by Messrs. J. Deacon Newton & Co.

The parties had come together at the beginning of November, they afterwards separated again; and they were in fact living

apart on December 21, the date of change of solicitors. After that date, there were negotiations between the new solicitors for the wife and the solicitors for the husband, with a view to agreeing the terms of a deed of separation; but, before those negotiations were concluded, that is to say about the middle of February, 1911, the parties again resumed cohabitation; and they are now living together.

Now with regard to the steps taken by the wife's former solicitor with reference to his costs. December 21 was in the Christmas week. Whether he could have taken his bill of costs in then, or at any time before the end of the Christmas vacation, I do not know; but it is quite proper, in considering the question of delay, to look at the time of year when the bill of costs was, or might have been, sent in. The bill of costs was, in fact, sent on January 10, 1911, to the new solicitors for the wife. There was considerable delay on their part; and it was not till January 31, 1911, that they sent the bill back to the former solicitor, with a letter referring him to the husband; and on the very next day it was sent by him to the husband. About a fortnight later, Mr. Whitehead wrote again to the husband; and this brought forth the reply which was read with such a degree of pleasure by Mr. Bartley Denniss.

On February 24 a summons for leave to withdraw the petition which had been taken out by the wife's present solicitors, and served upon the solicitors for the respondent in due course, was heard before the registrar. The respondent's solicitors consented to the application; but the wife's former solicitor, who had in some way heard of the intended application, attended before the registrar and objected to the order being made unless his costs were provided for. Upon this summons no order was made. Subsequently the respondent took out the summons which is now before me.

The contention of Mr. Grazebrook on behalf of the husband really comes to this, that the wife's former solicitor never intended to proceed in this Division at all, because he delivered to the client a signed bill of costs, and was only waiting for the statutory period of one month to run out before suing; and Mr. Grazebrook further contends that the suit has been at an

1911

JINKS v. JINKS.

The President.

end since November, 1910, and that there has been such delay that the solicitor ought not now to be allowed to bring in his bill in this Division, but ought to be relegated to such rights as he may establish by an action at common law for necessaries.

I decide that there has been no unreasonable delay on the part of the wife's former solicitor. It was not unreasonable to send the bill to the wife's present solicitor: see r. 155 of the Divorce Rules.

As to the application to dismiss where the costs have not been provided for, there is no authority directly in point, but there are cases where there has been a stay of proceedings until costs have been paid or discharged.

The case of *Joseph* v. *Joseph and Burnhill* (1) was not quite the same as this. It does not quite appear from the report of *Warwick* v. *Warwick* (2) whether the costs had been taxed or not.

There is no authority against the solicitor here, unless it be the case of *Nairne* v. *Nairne* (3); but, in my opinion, that is not an authority against him. The pleadings in that case had been closed and the cause set down on February 18, 1901. It is usual, and proper, when a cause is set down for hearing, that the solicitor should carry in his bill of costs. That date had long passed; and, two months after that, the suit was stayed by the respondent's solicitors. It was not till July, 1901, that the bill was carried in for taxation. Gorell Barnes J. said: "The question I have to decide is simply this: Can solicitors, who, on their own motion, have ceased to act for the petitioner, and given notice that they have ceased to do so, apply here for security for, or payment of, their costs?" And, later on in his judgment, he says this: "If a solicitor does not choose to follow the ordinary practice and obtain security, but prefers to wait, he cannot, after abandoning the suit, apply for security, as he is no longer acting for his client, and must be left to take his remedy at common law."

There, the solicitors themselves put an end to the relationship of solicitor and client. They waited till long past the time

(1) 76 L. T. 236. (2) 85 L. T. 173.
(3) 71 L. J. (P. & M.) 37.

1911

JINKS v. JINKS.

The President.

when, in the ordinary course of things, their bill would be carried in. They had, of their own motion, ceased to act as solicitors. The question I have to deal with is a different one:— Can a client herself, by merely giving notice of change of solicitors, take away from those who have, up to that time, acted as solicitors for her, the ordinary protection of solicitors acting for wives? In my view, it is not reasonable so to hold. I am not deciding anything which is unfair to the husband in this case; because he will be able to protect himself, and take all objections, and to say, if the facts warrant it, that the wife's former solicitor had no reasonable right to act as he did for the wife in the circumstances; and then the costs would not be given to the solicitor at all. If, on the other hand, some of the costs in the bill are properly allowable, it ought to be open to the solicitor to have them dealt with in this Division, if he wishes to do so, without being compelled to have recourse to an action at common law.

My order upon this summons is, that the proceedings in this suit be stayed, and that this summons be adjourned, in order that the former solicitor for the wife may have an opportunity of carrying in his bill for taxation in this Division; and, to obviate the necessity of a second taxation, the costs of this summons, and of the summons before the registrar on February 24, may be added to the bill and taxed therewith, but without prejudice to any order that the Court may think fit to make as to such costs.

On the application of counsel for the husband, leave to appeal was granted.

Solicitors for husband: *C. O. Humphreys & Son.*
Solicitors for wife: *J. Deacon Newton & Co.*
H. Vaughan Whitehead in person.

H. D. G

C. A.
1911
March 2, 3, 6, 7.
April 11.

[IN THE COURT OF APPEAL.]

THE HERO.

Admiralty—Collision—Single Ship and Squadron of Warships — Negligence—Contributory Negligence—"Course authorized or required by these Rules"—Regulations for Preventing Collisions at Sea, 1897, *art.* 28—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 419, *sub-s.* 4—*Costs.*

In an action of damage by collision brought by the plaintiffs, the Commissioners for executing the Office of Lord High Admiral of the United Kingdom, and the officers and crew of a torpedo destroyer (suing for their lost effects), against the defendants and counter-claimants, the owners of a merchant steam vessel, it was held in the Court below (following *H.M.S. Sans Pareil*, [1900] P. 267) that those responsible for the navigation of the merchant vessel got her into a wrong position with reference to the flotilla, of which the warship formed part, and in so doing were guilty of bad navigation involving negligence in law; but that those in charge of the warship could, by the exercise of ordinary skill and care, have avoided the collision, and, therefore, they were alone to blame. The plaintiffs appealed, contending that the defendants were alone to blame:—

Held by the Court of Appeal (Vaughan Williams, Farwell, and Kennedy L.JJ.), differing from the Court below on a question of fact, that the allegation of those in charge of the merchant vessel that they sounded the appropriate signal, when porting the helm shortly before the collision, had not been established, and, as this omission might by possibility have contributed to the collision, those in charge must be deemed, under s. 419, sub-s. 4, of the Merchant Shipping Act, 1894, to be in fault for a breach of art. 28 of the regulations for preventing collisions at sea, and that the "statutory blame," for not sounding the signal appropriate to the course, followed, although the Court found that the course taken by the merchant vessel was not a "course authorized or required by the rules" within the meaning of the article. The decree of the Court below on the claim and counter-claim was, therefore, amended by a finding that both vessels were to blame, with no costs in the Court of Appeal or in the Court below.

Appeal by plaintiffs, the Commissioners for executing the Office of Lord High Admiral of the United Kingdom, and the officers and crew of H.M.S. *Blackwater* (suing for their lost effects), against a decision of Sir Samuel Evans, President, in an action of damage by collision, pronouncing the collision to have been occasioned by the fault or default of John M. D. E. Warren, commander of H.M.S. *Blackwater*, and Henry Irish, gunner of the same, or one of them, and pronouncing in favour of the

counter-claim of the defendants, the Bristol Steam Navigation Company, owners of the steamship *Hero*.

The action was tried on May 9, 10, 11, and 12, 1910, when the Court was assisted by two of the Elder Brethren of the Trinity House, and, on May 30, the following judgment was pronounced from which the facts fully appear :—

SIR SAMUEL EVANS, PRESIDENT. The questions to be determined in this case relate to a collision which occurred in the English Channel in the night of April 6, 1909, between H.M.S. *Blackwater* and the steamship *Hero*.

The action is brought by the Commissioners for executing the Office of Lord High Admiral of the United Kingdom and the officers and crew of H.M.S. *Blackwater* as plaintiffs against the owners of the steamship *Hero* as defendants. There is a counter-claim by the defendants. It was originally a counter-claim against the captain and navigating officers of H.M.S. *Blackwater*, but, by an amendment which was made by consent at the commencement of the trial, it is now a counter-claim against Commander Warren, R.N., and Henry Irish, a gunner, who were respectively the commander and the officer in charge of the *Blackwater* at the time of the collision.

H.M.S. *Blackwater* was a twin screw torpedo destroyer of the river class, 225 feet in length and 23½ feet beam.

The *Hero* is a merchant vessel, a steel screw steamship 280 feet in length, of 1812 tons gross and 1164 tons net register, of 1500 horse power indicated, laden with a cargo of general goods, and manned by a crew of twenty hands all told.

As the result of the collision the torpedo destroyer was sunk and lost, and the merchant vessel suffered some damage.

The torpedo destroyer was one of a flotilla of twenty-one ships proceeding in two columns up the English Channel on a voyage from Portland to the Firth of Forth.

The merchant vessel was proceeding on a voyage from Rotterdam to Bristol. The collision took place between five and six miles to the E.S.E. of Dungeness. The weather was fine and clear, and there was nothing unusual in the wind or tide which affected the case. There was some question as to the

1911

THE HERO.

The President.

exact time when the actual collision occurred, and as to whether it took place about the time of a change by the flotilla of a course of N. 74° E. (magnetic) for a course of N. 63° E. (magnetic). The evidence on behalf of the plaintiffs satisfied me that the collision took place about 11.15 or 11.20 P.M., after the flotilla had been for some time, and for some miles, steady on the new course of N. 63° E. magnetic, under a speed of about twelve knots. This speed was accelerated to 15½ knots, but only just before the impending collision.

The speed of the merchant vessel was about ten knots, until just immediately before the collision, when her engines were put full speed astern. Thus the combined speed at which the torpedo destroyer and the merchant vessel were approaching each other was about twenty-two knots, which would cover one mile in 2¾ minutes, or about 730 yards in one minute.

The flotilla consisted of one third-class cruiser, two scouts, and eighteen torpedo destroyers.

It was disposed in two columns (eleven vessels in the port column and ten in the starboard column). The cruiser *Sapphire* was the leading ship, and headed the port column.

There were three sub-divisions in each column.

The port column was disposed as follows:—

1st sub-division.—The *Sapphire* (cruiser), the *Colne* (torpedo destroyer), the *Jed* (torpedo destroyer).

2nd sub-division.—The *Skirmisher* (scout), the *Siren* (torpedo destroyer), the *Fawn* (torpedo destroyer), the *Racehorse* (torpedo destroyer).

3rd sub-division.—The *Forward* (scout), the *Itchin* (torpedo destroyer), the *Ouse* (torpedo destroyer), the *Liffey* (torpedo destroyer).

The starboard column consisted of ten vessels, all torpedo destroyers, disposed as follows:—

1st sub-division.—The *Kale*, the *Derwent*, the *Chelmer*.

2nd sub-division.—The *Foyle*, the *Cheerful*, the *Peterel*, the *Flirt*.

3rd sub-division.—The *Blackwater*, the *Arun*, the *Moy*.

The colliding vessel, the *Blackwater*, was therefore the leading vessel in the last sub-division in the starboard column.

1911

THE HERO.

The President.

The vessels in the starboard column kept their stations by those abeam in the port column.

In accurate station, there should be a distance of one cable (measuring from foremast to foremast) between each vessel in a sub-division in either column, a distance of four cables (similarly measured) between each sub-division, and a distance of four cables between the two columns, so that a vessel in the starboard column should be four cables to the starboard of the corresponding vessel in the port column. For the purposes of this case the important factors are, that in accurate station the *Blackwater* would keep her station by, and be four cables to the starboard of, the *Forward* of the port column; and in the starboard column, seven cables astern of the *Foyle*, six cables astern of the *Cheerful*, five cables astern of the *Peterel*, four cables astern of the *Flirt*, one cable ahead of the *Arun*, and two cables ahead of the *Moy*.

Representative witnesses were produced by the plaintiffs from various vessels of the flotilla. Leaving out for a moment the witnesses from the *Blackwater* herself, the witnesses called by the plaintiffs were as follows:—

From the *Sapphire*, Lieutenant Thom; from the *Kale*, Commander Barlow; from the *Derwent*, Sub-Lieutenant Bowly; from the *Foyle*, Commander Withers; from the *Flirt*, Gunner Penhallurick; from the *Moy*, Commander Rose and Sub-Lieutenant Turnor.

The best evidence with regard to the actual position and stations of the vessels in the flotilla after the change of course from N. 74° E. to N. 63° E. (magnetic) was, in my opinion, that of Commander Withers, who was in charge of the *Foyle*, at the head of the 2nd sub-division in the starboard column.

When the merchant vessel and the flotilla were approaching each other the 1st sub-division in the starboard column had got wide of their stations, so that they were about six or seven cables (instead of four cables) away from the corresponding vessels in the port column.

The merchant vessel passed the three vessels of the 1st sub-division within the lines, that is, she passed them port to port, or red to red, on an opposite course.

1911

THE HERO.

The President.

The four vessels in the 2nd sub-division were in their right stations, that is, all four cables to starboard of the vessels abeam in the port column, and the merchant vessel passed them on the opposite side, that is, green to green, and about one cable away on an opposite course.

The *Blackwater* and the other two destroyers in the 3rd sub-division were somewhat out of their stations, being nearer to the port column than the four cables, that is, being about three or three and a half cables away from the port column.

Somewhere between the *Cheerful* and the *Flirt* the merchant vessel ported a little and steered a course which would again get her between the lines of the flotilla.

When the vessels in the 3rd sub-division were observed, the merchant vessel intended to pass them port to port, or red to red.

For the purpose of this case I decide, as indeed I am bound to do, after the judgments of the Lords Justices in *H.M.S. Sans Pareil* (1), that, after the merchant vessel passed the 2nd sub-division, and as she approached the 3rd sub-division (headed by the *Blackwater*), those responsible for her navigation got her into a wrong position with reference to the flotilla, and that in so doing they were guilty of bad navigation, and were negligent in law.

I need not, therefore, pause to deal with the "Notice to ship-owners and masters" which was issued by the Marine Department of the Board of Trade in April, 1897, and which was fully considered in *H.M.S. Sans Pareil.*(2)

Further, as regards the liability of the merchant vessel, there remains to be determined the question whether, apart from her faulty navigation or negligence, she was guilty of a breach of any, or of one, of the regulations for preventing collisions at sea, 1897, which would involve a statutory imputation of blame under the Merchant Shipping Act, 1894, s. 419. It appears to have been decided that the statutory obligations and penalty under s. 419 of the Merchant Shipping Act, 1894, do not attach to vessels of the

(1) [1900] P. 267.

(2) [1900] P. 267. The notice is set out in the note at p. 275 of the report.

fleet belonging to the Crown, because the Act does not apply to them: see *H.M.S. Sans Pareil.* (1)

Similar regulations in every respect have been issued for His Majesty's ships by Order in Council in 1899, but they are merely regulations or guides for good seamanship. They were not made under, or by virtue of, the Merchant Shipping Act, 1894, and the non-observance of these regulations does not involve the "statutory blame" (to put it shortly) which attaches to private vessels to which the regulations for preventing collisions at sea, 1897, apply.

The question has been raised whether, in a collision between a private ship (like a merchant vessel) and one of His Majesty's ships, the merchant vessel escapes the statutory sanction and penalty on the ground that His Majesty's ship is not subject to the like sanction and penalty, that is, whether there must be a mutuality of liability; or, in other words, whether the statute can apply to one of two vessels, if it does not equally apply to both.

The judgments in *H.M.S. Sans Pareil* (2) in the Court of first instance and in the Court of Appeal do not appear to agree upon this question. Counsel for the merchant vessel in this case declined to take upon himself the burden of contending that in such a case the merchant vessel would escape the statutory blame, if she was guilty of a statutory breach. In the view I take of the facts it is not necessary to decide this very important question in this action.

There is one other matter to which I must refer, before proceeding to discuss where the liability lies for this collision. It appears to be the result of the decisions that, in any event, whether the collision is between private vessels or not, the non-observance of arts. 27 and 29 of the statutory regulations does not involve the penalty of the "statutory blame." Personally, I incline to entertain the doubt as to this which was expressed by Vaughan Williams L.J. in his judgment in *H.M.S. Sans Pareil* (3); but, in this case, counsel for the defendants went still further, and

(1) [1900] P. 267. The terms of s. 419, sub-s. 4, are set out in the judgment of A. L. Smith L.J. at p. 282 of the report.

(2) [1900] P. 267.

(3) Ibid. at p. 286.

1911

THE HERO.

The President.

contended that a breach of art. 28 of the collision regulations, by the omission to sound the appropriate signal on making a change of course, does not involve "statutory blame," and that, in this respect, art. 28 is to be regarded as on the same footing as arts. 27 and 29. I cannot accede to that contention—I am of opinion that a breach of art. 28 would involve the statutory obligation and penalty. I may add that I should be loth to extend the category of articles which might be evaded without incurring the statutory penalty.

Having expressed these opinions, I must now look closely at the circumstances immediately preceding the collision in this case.

The evidence was conflicting on many points.

When, in the course of this judgment, I state a fact without qualification, it must be taken that that is a fact which I found upon the evidence.

First, with regard to the *Hero*. At the time of the collision her master was below, and only came on deck after feeling the shock of the impact. The officer in charge was the mate, Gracey. He was not called as a witness. Counsel for the defendants intended to call him, and telegrams were received from day to day with reference to the expected arrival of the vessel in which he was employed at the time of the trial, and as to his being able to attend at the trial. The end of the case was reached, however, before he arrived. Counsel for the defendants did not ask for an adjournment, but elected to close their case without Gracey's evidence. His deposition before the Receiver of Wreck was put in by the Solicitor-General without objection, but with the reservation that they (counsel for the defendants) did not put it in as part of their evidence.

Nethercott, the look-out man on the *Hero*, died before the trial; Rallo, the man at the wheel, and Shellard, the chief engineer, were the only witnesses called from the *Hero*, other than the master, who, as stated, was not able to give evidence of the facts leading up to the collision.

Secondly, with regard to H.M.S. *Blackwater* (I have before mentioned the witnesses called from the vessels in the flotilla other than the *Blackwater* herself), the witnesses from this

1911

THE HERO.

The President.

torpedo destroyer were Commander Warren, Gunner Irish (the officer on watch), Crossman (the man at the wheel), Blair (the signalman), and Bateman (the engine-room artificer). Deem, the look-out man, was not available, as he had gone to Australia, but reference was made to the transcript of the notes of the evidence which he gave at a court-martial which had been held dealing with the conduct of Irish. Deem had left his look-out station before the collision. He was under some impression that the commander had called him to the chart-room. He left his station without telling the officer in charge that he was going. He was away from his station for a "minute or two," and on returning he met the signalman (Blair) going down to the commander. Deem saw no lights of the *Hero*, but after being absent from his station for "a minute or two" he saw the hull of the *Hero* distinctly about two cables away. He did not return to his station, but went below to the mess deck and piped "Clear lower deck; hurry up." He did this without orders.

The signalman, Blair, was also entrusted with some look-out duties. He was, however, logging a signal a little time before the *Hero* was sighted. When he sighted her he said she was abreast the *Cheerful*, which would be about six cables distant.

Crossman, the man at the wheel, saw nothing of the *Hero* or of her lights before the collision. She was sighted first by Gunner Irish, the officer in charge. He said that he sighted her about eight to ten cables distant, bearing a point on his starboard bow, and shewing her steaming light, and her green light to his own green light.

In my opinion she could have been, and ought to have been, sighted much sooner, if a proper look-out had been kept on board H.M.S. *Blackwater*.

The officer in charge said that when she was about three or four cables distant she altered her course to starboard, shutting out her green light, and opening her red. He (Irish) then ported his helm from 15° to 20°, in order to pass the *Hero* port to port; he himself went to the wheel to give it the necessary "two turns" for the purpose. He then said, in the presence of the quartermaster and signalman, "Red to red,

1911

THE HERO.

The President.

perfect safety, go ahead," or, according to another account, "We will bring them red to red." When he ported his helm he ought, according to the regulations, to have blown a one-blast signal on his siren, but he did not. The reason he gave was that at that time the *Hero* appeared to him to be abreast of the *Flirt* (which, in proper station, would be four cables ahead), and that, if the one-blast signal had been given by him, the *Hero* would be in doubt as to which of the destroyers had given the signal.

In the first place, this indicates that the *Hero* was further away from the *Blackwater* when she was sighted than Irish stated. In the next place, in my opinion, the reason given was not an adequate one, and Irish ought to have ordered or given the one-blast signal. If it had been given, apart entirely from the warning which would thereby be conveyed to other vessels, it would quite possibly, and even probably, have affected the situation in so far as the *Blackwater* herself was concerned, because the commander, who was awake in his chart-room, might have heard it, and, if he had, he would have known when he reached the bridge that his vessel was on her port helm.

I think, therefore, that Irish was at fault in not giving the signal. Having ported his helm, his vessel answered the helm till he got the *Hero* about one point on his port bow, and his opinion was that he would have safely passed the *Hero* port to port on that helm. Then he wanted to send for the commander, pursuant to the instructions which the commander had given him. He called out for the look-out man Deem, in order to send him down to the chart-room. There was no answer, because Deem was not at his post. Then he sent down Blair, the signalman, and Blair went down and informed the commander. A minute or so elapsed, according to the commander's evidence, before he got on the bridge. Probably a minute and a half, at least, had elapsed since the officer in charge had ported his helm. If so, this would have brought the vessels about five and a half cables, or 1100 yards, nearer to each other when the commander reached the bridge than they were when the officer ported the helm.

I am of opinion that when the commander got on the bridge

1911

THE HERO.

The President.

the *Blackwater* was steady on her port helm. The commander said he was not aware of this. He did not ask the officer under what helm she was. I think he ought to have made this inquiry.

The officer in charge and the commander do not agree about this matter, or about the bearing of the *Hero* upon the *Blackwater* when the commander reached the bridge. The officer in charge said he told the commander when he arrived that the vessel was under her port helm. If he did not, he ought to have. The commander said that when he got on the bridge the first thing that happened was that he gave an order, "Starboard 30°, Full speed ahead," and that after he had given this order, and not before, the officer in charge told him he had given her port helm, to which the commander replied, "Well, it is no good." I prefer to accept the commander's version about this, and therefore I think the officer in charge neglected his duty to inform the commander.

As to the bearing, the commander said that when he got to the bottom of the ladder, and on to the bridge, the *Hero* shewed her red light bearing about two points on the *Blackwater's* starboard bow. The officer in charge said she bore about one point on his port bow, having come to this bearing by reason of his having ported the helm of the *Blackwater*.

Immediately the commander came on the bridge, when his destroyer was, as I find, on her port helm, a series of orders was given by him. The accounts which were given of them by the witnesses from the *Blackwater* did not agree. Whatever view may be taken of the orders and directions given by Commander Warren, I desire to put it on record that he gave his evidence in a manly, straightforward, and honourable way, without any attempt to shrink from the consequences of his orders, or to avoid the results which might follow his testimony. According to Commander Warren's recollection, the orders he gave were in the sequence which I shall now proceed to give rather fully.

(In detailing the orders, I have added some statements of the most material facts and events which accompanied or resulted from the orders, and also some comments which appear to me to be justified.)

1911

THE HERO.

The President.

The sequence of the orders was as follows:—

1. Thinking that the *Hero* was about two cables distant, with her red light about two points on the *Blackwater's* starboard bow, and not knowing that the *Blackwater* was on a port helm, he ordered "Starboard 30°, Full speed ahead." "Starboard 30°" would be very nearly "Hard-a-starboard." It would be within 5° of it.

The destroyer's speed at the time was about twelve knots, and she had a reserve speed of another six knots, or thereabouts.

When the order was given, no signal was sounded. The appropriate signal would have been two short blasts.

Commander Warren, in cross-examination, said "It would have been better to have given the signal." It ought to have been given, and I see no adequate reason why it was not. If it had been, the *Hero* might have put her engines full speed astern in time, or manœuvred in some other way to avoid the collision.

2. After the order "Starboard 30°, Full speed ahead" was given, Irish said, "I have already given her a port helm," or "My helm is a-port." Commander Warren replied, "Well, it is no good."

3. Having had more time to look at the *Hero*, the commander came to the conclusion that his vessel must be nearly crossing the *Hero's* line of advance, and fearing that the stern of his vessel would not clear the *Hero* with the starboard helm, he ordered "Hard-a-port."

4. He himself then worked the telegraph to reverse the starboard engine. His object was to hasten the action of the port helm.

5. He ordered Irish to blow "one short blast" (a signal to indicate that he was directing his course to starboard).

6. He said that he thought that he must have ordered "Full speed astern" by mistake, because, while he was telegraphing to reverse the starboard engine, and intending to reverse that alone, the port engine was also reversed by the man attending to its telegraph.

7. Although he ordered one short blast, he heard his siren sound a three-blast signal, which he had not ordered.

1911

THE HERO.

The President.

8. Immediately, or very shortly, afterwards he ordered "Full speed ahead," although the signal just given indicated the exactly opposite order of "Full speed astern."

Then his vessel was struck with great violence by the *Hero's* stem or starboard bow, about 40 feet from the stern of the *Blackwater*. The latter's speed had increased between three and four knots during the time the various orders above enumerated were given. So much for the evidence of Commander Warren on these matters.

According to Irish, the officer in charge, the sequence of the orders of the commander was as follows :—

(1.) "Hard-a-starboard" (after Irish had told him the vessel was on a port helm). (2.) "Full speed astern." (3.) "Sound the siren, three blasts." (4.) "Full speed ahead."

He said he did not hear the order of "Full speed ahead" which the commander said he gave with the first order ; nor the order "Hard-a-port" or any "port" order ; nor an order to sound one blast. Crossman, the man at the wheel, described the orders thus : (1.) "Starboard 30°," and (2.) "Hard-a-port." He said the second order was given when he had only got 15° of the starboard helm on the indicator in obedience to the first order. According to Blair, the signalman, the orders were as follows :—(1.) "Starboard 30°. Full speed ahead," then a pause —and (2.) "Full speed astern." He spoke to no other orders. Bateman, the engine-room artificer, received the following orders in the engine-room :—(1.) "Full speed ahead," (2.) "Full speed astern" (after a few seconds), (3.) "Full speed ahead." He said that from the first order to the collision the interval of time was just upon one and a half minutes. The combined distances travelled during that time would be over 1000 yards ; and the distance travelled by the destroyer on her first speed alone would be 600 yards. He also proved that his speed had increased, and that the engine made 170 revolutions at the time of the collision, which gave a speed of $15\frac{1}{2}$ knots. It is probable that the commander thought that, with the reserve of speed which he could utilize, he could have safely crossed the bows of the *Hero*. He very nearly succeeded in doing so ; and he would have succeeded if he had had about four

1911

THE HERO.

The President.

seconds more time. But the attempt was a risky one, and unfortunately it failed.

It is to be remembered, of course, that estimates and calculations of time in such circumstances are uncertain, even more so than estimates of distance.

In considering what manœuvres were possible or justifiable on the part of the *Blackwater*, attention must be given to the fact that she was (as all these torpedo destroyers are) a very handy vessel, quick to answer her helm, and easy to work with her engines. It was given in evidence by Commander Warren that by going full speed astern she could be pulled up in from one to two lengths.

I have now dealt with the case upon the evidence from the *Blackwater*.

As to the evidence from the *Hero*, unfortunately the Court was not assisted by the evidence of Gracey, the officer in charge of the *Hero*, as he was not called, as I have before explained. Referring to his deposition before the Receiver of Wreck, and leaving out the part which has become unimportant in view of my decision that her position established negligence in law on the part of her navigating officers, the account given by Gracey with regard to the *Blackwater* and the other two vessels in her sub-division is shortly as follows. When, continuing on his course, the last three vessels were on his port bow, and shewed all their lights, being in doubt whether these three vessels could see his side lights, he closed his green, and shewed a good red. Immediately his green was closed "the two outside vessels" (by which, I think, he meant the *Arun* and the *Moy*) ported to clear him. The third vessel (by which, I think, he meant the *Blackwater*) came on shewing green and red, until when about half a mile distant she shewed her red for a brief space, then suddenly starboarded, and apparently attempted to cross his bow. He then, fearing a collision, put his engines full speed astern, and blew three short blasts. The *Blackwater* continued on her course, and the *Hero* struck her between amidships and aft on her starboard side.

Rallo, the only witness called who was on the *Hero's* deck, was at the wheel, in the wheelhouse on the upper bridge.

1911

THE HERO.

The President.

This witness was at times confused in answering questions as to the lights which he saw, and he was in some matters mistaken ; but I came to the conclusion that he was a truthful and an honest witness.

The result of his evidence with reference to the position of the 3rd sub-division of the flotilla, as I accept it, is shortly as follows. From the three vessels in this sub-division he saw (1.) the green lights of all three vessels ; (2.) red and green from all three ; then, after the *Hero* had ported a point or so, (3.) the green light of the *Blackwater* and the red lights of the *Arun* and the *Moy*.

His evidence as to the sound signals from the *Hero* I shall refer to later.

Apart from the evidence of what was done by the *Arun* and the *Moy*, the conclusions which I draw from the evidence are these : that the *Blackwater* could, by the exercise of ordinary skill and care by her officers, have avoided the collision by keeping on the port helm which had been given to her by Gunner Irish ; that in the various orders and manœuvres on board the *Blackwater* after the *Hero* was sighted there was a confusion, an uncertainty, a want of decision, and an absence of ordinary skill and care ; that there was no situation of extreme peril or sudden emergency to account for these things (as, *e.g.*, in *The Bywell Castle* (1)) ; that her manœuvres and navigation were faulty and negligent ; that this negligence contributed to the accident ; and that apart from such negligence the collision would not have happened.

In these conclusions the Elder Brethren of the Trinity House who assist me concur.

But the Court is not left to speculation as to what might have been done. The matter has been placed outside the region of speculation by the admissions of Commander Warren, and by the evidence of what was actually done by the *Arun* and the *Moy* in the like circumstances. Commander Warren admitted that, even if the distance between the two vessels when he got on to the bridge was two cables only, if the *Blackwater* had been kept a-port, she could possibly have cleared the *Hero* port to port ;

(1) (1879) 4 P. D. 219.

1911

THE HERO.

The President.

and if the distance was anything like four cables, she would certainly have so cleared her. What was done by the *Arun* and the *Moy* was described by Sub-Lieutenant Turnor and Commander Rose, who were on the *Moy*, the second vessel behind the *Blackwater*. The sub-lieutenant sighted the *Hero* about abreast the *Peterel*, that is about seven cables away, and he called the commander, who came on the bridge. He saw her altering and approaching under port helm. He thought he gave the order to port his own helm before the commander came on the bridge. At any rate her helm was ported, so was that of the *Arun*; and at first he observed that the *Blackwater* seemed to have port helm also before she swung round to port.

When Commander Rose came on his bridge, he saw the *Hero* six cables away. He waited, and when she was four cables away, and not before, he gave the order to port his helm. The *Arun* ported about the same time; and both the *Arun* and the *Moy* passed all clear of the *Hero* port to port. Commander Rose also stated that when he got on the bridge and saw the *Hero's* light, he thought there was time for the *Blackwater* to get out of the way by porting her helm; and that the effect of starboarding the *Blackwater* was to throw her across the bows of the *Hero*. Clearly the opinion of Commander Rose, who saw the incidents at the time, was that the accident might have been avoided by ordinary skill and care on the part of those responsible for the *Blackwater*.

My nautical assessors advise me that what the *Arun* and the *Moy* did the *Blackwater* could have done.

There was, therefore, negligence on the *Blackwater*.

But, as I have said, there was negligence also attributable to the *Hero* by reason of the position in which she had been placed with reference to the flotilla. Was she, in addition to this negligence, also guilty of a breach of a regulation which would involve "statutory blame," so that, whatever the negligence of those responsible for the *Blackwater* might have been, the *Hero* would be also to blame, and would be responsible for half the damage in accordance with the admiralty rule? This depends upon whether a sound signal—one short blast—was sounded by the *Hero* when she ported.

1911

THE HERO.

The President.

This question of fact has to be decided upon positive evidence, upon negative evidence, and upon inferences from the evidence and the surrounding circumstances. Rallo, the man at the wheel, gave positive testimony that the signal was duly given. Upon being pressed, he was very firm that it was. As against this, reliance was placed by the Solicitor-General upon the omission in the deposition of Gracey of any reference to this sound signal. The negative evidence consists of statements by various witnesses for the plaintiffs that they did not hear the signal, and by some of them that, if it had been given, they must have heard it. The omission from Gracey's deposition must be put into the scale in weighing the evidence, but I do not attach overwhelming weight to it. The sound signal was stated in the preliminary act and in the defence. As to the negative evidence, I have considered it carefully. A short résumé of the testimony of the witnesses who were asked as to the various sound signals may be useful in estimating the importance to be attached to it.

First of all, there is no dispute (apart from the question which I am now discussing as to whether a one-blast signal was given by the *Hero*) about the other sound signals which were given by both vessels. At any rate, I find that they were in fact as follows:—A three-blast signal from the *Blackwater*, and a three-blast signal from the *Hero*.

The witnesses who were examined about sound signals were Commander Warren, Irish, Crossman, Blair, Gunner Penhallurick, Sub-Lieutenant Turnor, Commander Rose, and Rallo.

Commander Warren said the only signals he heard were the three blasts from his own siren. He, probably, would not have heard the one-blast signal of the *Hero*, even if it had been sounded, because he was lying down in the chart-room. He did not hear the three-blast signal from the *Hero*, but he said that she may have sounded them without his hearing them. Irish only heard his own three blasts. He thought that if the *Hero* had sounded one blast he would not have missed it. He did not hear the *Hero's* three blasts. Crossman heard no sound signal at all, either on his own or from any other vessel. Blair took no notice of, or did not remember, any sound signal at all on his own vessel, or from the *Hero*. Gunner Penhallurick

1911

THE HERO.

The President.

heard no sound signals at all from either vessel. Sub-Lieutenant Turnor thought he remembered a three-blast signal, and that it was from a siren on the *Blackwater*, but he was not certain about it. He heard no other. Commander Rose said he fancied he heard three blasts from a siren, but subsequently said that the evidence he gave at the court-martial, namely, that he only heard one blast, was much more likely to be accurate. It was common ground that no signal of one blast was given from the *Blackwater*. Therefore, if he did in fact hear a one-blast signal, it must have been from the *Hero*.

The evidence being in this state, I have come to the conclusion that Rallo's positive statement can, and ought to be, accepted, and that when the *Hero* ported she sounded the appropriate signal of one short blast.

If she did, no statutory blame attaches to her in this case. But if she did not, the question would then be whether her failure to do so could, by any possibility, have contributed to the collision. I am satisfied that, even if she did not signal, this did not, in fact, contribute to the accident, because Irish and others saw her port; but I do not think I could say that it could not by any possibility have contributed to it. But, if I am justified in my finding of fact, the question last referred to may be put aside.

The case then, in my opinion, stands thus: There is no "statutory blame" on either side—not on the part of the *Blackwater*, because she, as a King's ship, is not governed by the statutory regulations made under s. 418 of the Merchant Shipping Act, 1894; and not on the part of the *Hero*, because she is not proved to have been guilty of a breach of art. 28, or of any other statutory collision regulation.

But I find that there was negligence on the part of both vessels.

This being so, the common law doctrine of contributory negligence must be applied, as in *Cayzer* v. *Carron Co.* (*The Margaret*) (1) and *H.M.S. Sans Pareil.* (2)

That doctrine is, that if A. is injured by B., by the fault more or less of both combined, then if, notwithstanding B.'s

(1) (1884) 9 App. Cas. 873. (2) [1900] P. 267.

negligence, A., with reasonable care, could have avoided the injury, he cannot succeed in an action against B., and if, notwithstanding A.'s negligence, B., with reasonable care, could have avoided injuring A., A. can succeed against B.: see per Lindley L.J. in *The Bernina*. (1)

In the leading case of *Tuff* v. *Warman* (2), which was a case of collision in the Thames, it was said in the Exchequer Chamber that the proper question in such cases is "whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened."

In other cases it has been said that the question is, whose negligence was the "proximate cause" of the injury?

The Solicitor-General contended in this Court that the common law doctrine of contributory negligence should not be applied in the same way in the Admiralty Court as in the Common Law Courts; that if it was, the ordinary rule of "both to blame and division of damages" which prevails in admiralty could seldom have effect. He did not suggest what difference there could be in the principle of the application. On the question of fact, in any case, it is obvious that, in arriving at the "proximate cause" of an accident at sea, the difficulty of the task of manœuvring ships of various kinds and dimensions in uncertain states of weather or tide, and in the unforeseen and unforeseeable dangers which are met with upon the waters, must always be regarded; and it must often happen, where two vessels are at fault, that it is impossible to say that one of them without the aid of the other could avoid an accident, or that the fault or negligence of one alone is the proximate cause, so that it has to be decided that the combined negligence of both was the common cause, and that the "both to blame and division of damages" principle is to apply. Moreover, that principle must always apply where there is a breach of a statutory regulation, which so often occurs in cases of collision at sea.

(1) (1887) 12 P. D. 58, at p. 89. (2) (1858) 5 C. B. (N.S.) 573, at p. 585.

1911

THE HERO.

The President.

The "division of damages" rule, although not quite logical, because the damages are not proportioned either to the degree of blame or to the extent of the injuries caused, has been regarded for a long time in this country as a salutary rule in admiralty cases. Whether the doctrine of contributory negligence derived from the common law which has been imported into admiralty actions is equally salutary or reasonable it is not for me to determine. I have to act upon the settled law that the doctrine does apply in cases where the facts call for or permit its application.

The Solicitor-General, in his reply, called my attention to the case of *The Cambridge* (1), and he kindly supplied me with a transcript of the notes of the evidence and of the judgments of Sir Francis Jeune (then President of this Court) and of the Lords Justices in the Court of Appeal.

The case was decided in this Court on June 17, 1902, and in the Court of Appeal on July 1, 1903, that is, about three years after *H.M.S. Sans Pareil.* (2)

The President decided that the *Cambridge*, a passenger steamship, and H.M.S. *Salmon*, a torpedo destroyer, were both to blame and both liable; the *Cambridge* because she was guilty of bad navigation in shaping to cross the bows of the torpedo destroyer, and H.M.S. *Salmon* because if she had done what she could and ought to have done the collision would have been avoided. After the judgment had been delivered, Mr. Pickford (counsel for the *Cambridge*) called the attention of the President to the case of *H.M.S. Sans Pareil* (2), and asked him to apply the principle of that case, and to say that H.M.S. *Salmon* was alone to blame. Apparently thereupon the President said that he found that it would have required extraordinary care and skill, that is, something quite beyond ordinary care and skill on the part of H.M.S. *Salmon*, to avoid the collision, and accordingly he adhered to his decision that both were to blame, and he divided the damages.

Both sides appealed. The *Cambridge* appealed on the ground that the *Salmon* was solely to blame because she could, by the exercise of ordinary care and skill, have avoided the collision.

(1) Not reported (2) [1900] P. 267.

The *Salmon* appealed on the ground that the *Cambridge* was solely to blame, apparently, (1.) because in the circumstances the *Salmon* could not by the exercise of ordinary care and skill have avoided the collision; (2.) because the President had misdirected himself by acting on the principle that extraordinary care could be required; and (3.) because the *Salmon* was exonerated from liability by reason of a sudden peril or an extreme emergency.

Both appeals failed. In the Court of Appeal, so far as I can see from the judgments, the case of *H.M.S. Sans Pareil* (1) was not cited, or dealt with at all, in any of the three judgments, and the doctrine of contributory negligence (as applied to collisions at sea in the cases of *The Margaret* (2) and *H.M.S. Sans Pareil* (1)) was not considered, or even mentioned, except possibly in one passage in the judgment of the Master of the Rolls.

I have read the case carefully. Unless it is to be regarded as a case where both vessels were equally to blame, and brought about the collision by their common negligence, or where it required some extraordinary skill and care on the part of either vessel to avoid the accident, I find it impossible to reconcile the decision of the Court of Appeal with the decision in *H.M.S. Sans Pareil.* (1)

In the case now before the Court, I find that the negligence attributable to the *Hero* did not cause any sudden emergency or extreme peril which required any extraordinary skill or care to be exercised by the *Blackwater*, that the *Blackwater* was not hampered by the *Hero*, or by the other vessels of the fleet, so as to be unable to manœuvre properly or safely, and that, notwithstanding the negligence of the *Hero*, the collision could have been avoided by the ordinary skill, caution, and care to be reasonably expected from the navigating officers of H.M.S. *Blackwater*.

In these findings the Elder Brethren agree with me. I accordingly decide against the plaintiffs' claim.

As to the counter-claim it follows, from what I have before stated in discussing the facts, that Commander Warren and Irish were guilty of negligence which contributed to the collision; and that the *Hero* could not, about the time of the collision, have

(1) [1900] P. 267. (2) 9 App. Cas. 873.

1911

THE HERO.

The President.

avoided it by the exercise of ordinary care and skill by reason of the faulty manœuvres of the *Blackwater*.

As to this also the Elder Brethren agree.

Accordingly I decide the counter-claim, too, in favour of the defendants, and order a reference as to damages, if desired.

The order of the Court, therefore, is that judgment be entered for the defendants upon the claim and counter-claim, with costs.

The plaintiffs moved the Court of Appeal to reverse the decision of the President by pronouncing that the collision was occasioned by the fault or default of the owners, master, and crew of the steamship *Hero*.

The appeal was heard on March 2, 3, 6, and 7, 1911, the Court being assisted by nautical assessors.

Sir Rufus Isaacs, A.-G., Aspinall, K.C., A. D. Bateson, K.C., and *H. Gorell Barnes*, for the appellants (plaintiffs), the Commissioners for executing the Office of Lord High Admiral of the United Kingdom, and the officers and crew of H.M.S. *Blackwater*, suing for their lost effects.

The finding in the Court below is that those in charge of both the *Blackwater* and the *Hero* were negligent, but the learned President has let the *Hero* off, and found the *Blackwater* alone to blame on the ground that there was time and also opportunity for those in charge of the *Blackwater* to have avoided the consequences of the negligence of those in charge of the *Hero*. It is, however, clear from the evidence, set out in the judgment, that the position was one of sudden emergency, and according to well-known principles where one ship has by wrong manœuvres placed another ship in a position of extreme danger, that other ship, in this case the *Blackwater*, will not be held to blame if she has done something wrong, and has not been manœuvred with perfect skill and presence of mind. On this point the cases of *The Bywell Castle* (1) and *The Cambridge* (2) are in favour of the appellants: see also *The Frankfort*. (3)

With regard to the signalling the learned President states the case thus: "There is no 'statutory blame' on either side

(1) 4 P. D. 219. (2) Not reported; see ante, p. 146.
(3) [1910] P. 50.

—not on the part of the *Blackwater*, because she, as a King's ship, is not governed by the statutory regulations made under s. 418 of the Merchant Shipping Act, 1894, and not on the part of the *Hero*, because she is not proved to have been guilty of a breach of art. 28, or of any other statutory regulation." It is, however, submitted that a careful examination of the evidence shews that the signal deposed to as having been made on board the *Hero* refers to an earlier time than that relied on by the learned President, and that, in fact, no appropriate signal was given when the *Hero* ported just before the collision. This default is sufficient in itself to condemn the *Hero*.

Laing, K.C., and *Adair Roche*, for the respondents (defendants and counter-claimants), the owners of the steamship *Hero*.

The case in the Court below was decided against the appellants (plaintiffs) entirely on their own evidence.

[KENNEDY L.J. Not entirely, as the alleged whistling by the *Hero* rests on the evidence of one witness for the defendants.]

That is a pure question of fact, and the appellants would have to make out a very strong case before this Court would interfere with the finding of the Court below on a question of fact. As pointed out by the learned President in his judgment, the sounding of the short blast is stated in the preliminary act and in the defence, and is sworn to by the man at the wheel on the *Hero*; but, whether the whistle was sounded or not, art. 28 has no application, as it only applies to a steam vessel under way "taking any course authorized or required by these rules." In this case the course taken by those in charge of the *Hero* was not either "authorized" or "required" by the rules, even if the word "authorized" is used in the extended sense attributed to it by Sir F. Jeune in *The Uskmoor*. (1) See also *The Anselm* (2); *The Corinthian* (3); *The Bellanoch* (4); *The Mourne*. (5) It must be remembered that those in charge of the *Hero* cannot be penalized by s. 419, sub-s. 4, of the Merchant Shipping Act,

(1) [1902] P. 250, at p. 254.
(2) [1907] P. 151.
(3) [1909] P. 260.
(4) [1907] A. C. 269.
(5) [1901] P. 68.

C. A. 1911

THE HERO.

1894, for that section is not binding on the Crown, and, therefore, will not be applied as against the *Hero*. Secondly, the rules only come into force when there is risk of collision, and at the time it is alleged that those in charge of the *Hero* ought to have sounded the whistle there was no risk of collision, as the vessels were in a position of safety.

The grounds upon which the learned President proceeded, and upon which he found the appellants (plaintiffs) alone to blame, are clearly stated in the judgment and amount to this: that the negligence attributable to the *Hero* did not cause any sudden emergency or extreme peril which required any extraordinary skill or care to be exercised by the *Blackwater*. The case of *The Bywell Castle* (1), cited by counsel for the appellants, is therefore not in point. The case of *The Cambridge* (2) is fully dealt with by the learned President and affords no assistance for the decision of this case.

The wrong manœuvre on the part of those in charge of the *Hero* was long before those in charge of the *Blackwater* were called upon to act, and then the officer of the watch on the *Blackwater* did the right thing at the right moment and would have cleared if that manœuvre had not been defeated by the action of the commander. [Reference was made to *Radley* v. *London and North Western Ry. Co.* (3)]

The Attorney-General in reply. Those in charge of the *Hero* did not in fact give the appropriate signal when they ported for the *Blackwater*. If they had done so, it would have given those in charge of the *Blackwater* an indication of what was being done, and there would still have been time, with the reserve speed possessed by the *Blackwater*, to have avoided the collision. The result was that a sudden emergency was created which placed those in charge of the *Blackwater* in a difficulty, and threw upon them the obligation of exercising more than ordinary care. It lies on the respondents, the owners of the *Hero*, to shew that the omission to whistle could not by any possibility have contributed to the collision. This they cannot do. [Reference was made to the cases of *The Monte Rosa* (4); *The Clutha*

(1) 4 P. D. 219.
(2) Not reported; see ante, p. 146.
(3) (1876) 1 App. Cas. 754.
(4) [1893] P. 23.

Boat 147 (1); *The Frankland* (2); *The Etna* (3); *The Oxingdean Grange.* (4)

C. A. 1911

THE HERO.

Cur. adv. vult.

1911. April 11. The judgment of the COURT (Vaughan Williams, Farwell, and Kennedy L.JJ.). was delivered by—

KENNEDY L.J. We see no reason to dissent from the judgment of the learned President of the Admiralty Division, so far as it imputes actionable negligence to the navigation of H.M.S. *Blackwater.*

In regard to the *Hero,* he has found that those in charge of that vessel were also guilty of negligent and improper navigation in getting her into a wrong position in regard to the flotilla; but he has also found, in effect, that, although, if the *Hero* had kept her course after passing the starboard line of the 2nd division, as she ought to have done, and had not ported, as she did, she would have passed the *Blackwater* safely, green to green, yet, after this initial wrong-doing on the part of the *Hero,* the collision might have been avoided by the exercise of not more than ordinary care and skill on the part of those in charge of the *Blackwater* when they saw the wrong manœuvre of the *Hero*; and, so finding, he has held the *Blackwater* solely to blame for the collision. It is, as Bucknill J. remarked in his judgment in *The Etna* (5), frequently a matter of extreme difficulty to decide whether or not the negligence of the initial wrong-doer could have been avoided by the other party. In *The Margaret* (reported as *Cayzer* v. *Carron Co.*) (6) and in *H.M.S. Sans Pareil* (7) the question was decided one way, and in *The Etna* (3) and *The Cambridge* (8) it was decided the other way. It is not, in our view, an easy question to decide in the present case. It is, however, necessarily a question of fact depending upon the special circumstances of each case; and our nautical advisers concur with the assessors of the President in the Admiralty Court, that there was no such emergency created by the negligence

(1) [1909] P. 36.
(2) [1901] P. 161.
(3) [1908] P. 269.
(4) [1902] P. 208.
(5) [1908] P. 269, at p. 281.
(6) 9 App. Cas. 873.
(7) [1900] P. 267.
(8) Not reported; see ante, p. 146.

C. A. 1911

THE HERO.

and bad navigation of the *Hero* as might not have been successfully met by the exercise of ordinary care and skill on the part of those in charge of the *Blackwater*. In fact, Gunner Irish did take the right step by porting the helm of the *Blackwater*, and there would have been no collision but for the later orders of Commander Warren, which, unfortunately, destroyed the effect of this manœuvre. The appeal of the plaintiffs, therefore, fails so far as it depends upon allegations of the liability of the *Hero* for faulty or negligent navigation causing the collision.

There remains, however, for our consideration a very important question as to the liability of the *Hero* to the statutory imputation of blame, under the Merchant Shipping Act, 1894, s. 419, for a breach of art. 28 of the regulations for preventing collisions at sea. The learned President has expressly held, and, we think, rightly held, that an infringement or non-observance of art. 28 does involve statutory blame; and, although there is no express finding on the point, it is, we think, a necessary inference from the language of his judgment—which deals at length with the question of fact as to the sounding of a one-blast signal on board the *Hero*—that, if there were an omission on the part of those on board the *Hero*, when her helm was ported, to sound the one-blast signal, those in charge of her would have been held by him to have been guilty of a breach of art. 28, and, therefore, the *Hero* must in that case be held partly to blame for the collision under the Merchant Shipping Act, 1894, s. 419. He states in his judgment that, if at the time of the porting, which ultimately led to the collision, those on board the *Hero* omitted to sound, with the whistle, the appropriate one-blast signal, he could not say that this omission could not possibly have contributed to the collision; but the learned President, finding, as a fact, that this signal was given on board the *Hero*, has, of course, acquitted her of statutory blame.

The appellants contend that the evidence did not justify this finding of fact, and we have to consider and decide, first, whether the finding of fact was right, and, secondly, if we are of opinion that the finding of fact was erroneous, and that the one-blast signal was not sounded on board the *Hero* at the time in question, whether such an omission constituted a breach of art. 28;

for the respondents, besides arguing in support of the President's finding of fact in their favour in regard to the sounding of the one-blast signal, further contend that, even if that signal was not sounded, the *Hero* did not violate the provisions of art. 28 by such an omission.

First, as to the question of fact. This Court is very slow indeed to differ from the judge of the Admiralty Court on any decision of fact, depending simply upon the choice between affirmation on the one side and denial on the other and the credibility of witnesses who have been examined in open court at the trial. But, if it is convinced that the judge has been guided to his decision by some misapprehension of the effect of evidence, or of the inference to be drawn from it, or of material circumstances, it is, we conceive, the duty of the Court of Appeal to act upon its own view.

In the present case, the finding of the learned President that a one-blast signal was sounded with her whistle on board the *Hero*, at the time when her wrongful porting originated the collision with the *Blackwater*, depends entirely upon the evidence of a single witness, the helmsman Rallo. Neither of the two other witnesses—the master and the chief engineer—from the *Hero* deposes to hearing such a signal. Neither of them, it is true, was on deck, the master being in the chart-room, and the chief engineer in the engine-room, so that it is just possible that the whistle would have been sounded without being heard by either of them; and, further, so far as regards the master, it appears that he was actually asleep till just before the collision, and was only then aroused by something—"probably," he says, "by the whistle," but he "was not certain of that." It is possible that his conjecture was right, for just before the impact of collision, which he felt before he could get on his boots in order to go on deck, the *Hero* admittedly sounded the three-blast reversing signal. The fact remains that, in affirmance of a one-blast porting signal, Rallo is the solitary witness from the *Hero*; and from the same ship came negative evidence of a remarkable character. Gracey, the chief officer of the *Hero*, was the officer in charge on deck before and at the time of the porting in question and at the time of the collision. He

C. A. 1911

THE HERO.

was not called as a witness for the *Hero* at the trial, but his deposition before the Receiver of Wreck was put in evidence; and, further, the master of the *Hero* in the course of his re-examination stated the version of the events leading to the collision which Gracey gave to him on the bridge of the *Hero* immediately after the collision. Neither in Gracey's deposition nor in the oral narrative given by him to the master is there any mention of the one-blast signal alleged by Rallo; a strange omission—if omission it be, on the part of the responsible officer, who must have ordered the sounding of the signal—of a most important fact, both in his oral report to the master immediately after the event and in the signed deposition made by him at leisure four days later before the Receiver of Wreck.

Before passing on to the evidence of witnesses from the *Blackwater* and two other vessels of the flotilla, we think it is convenient to note, in regard to the testimony of Rallo, that his first mention at the trial of this port helm sound signal was not spontaneous, but was elicited, at the point where he had stated that the mate gave him an order to port, by a question put to the witness by the defendants' counsel, which, necessarily perhaps, involved an obvious suggestion—"Was there any signal blown?"—and, when in cross-examination he was pressed by the Solicitor-General as to the grounds of his persistency in the accuracy of his recollection, the witness to a considerable extent relied upon an alleged invariable practice on board the *Hero* "Every time you port one blast is blown?" Answer: "Yes, blown, yes."

Turning from the evidence of those on board the *Hero* to the evidence from the *Blackwater*, we find that Gunner Irish, the officer in charge, is positive that no such signal was sounded on the *Hero*, for, he says, if it had been sounded, he must have heard it. Neither Crossman at the wheel, nor Blair, the signalman, appears to have taken notice of any sound signals either on their own ship or on the *Hero*. The evidence from the *Flirt* and the *Moy* carries the case no further, one way or the other. The only signal which Sub-Lieutenant Turnor, of the *Moy*, seems to recollect is a three-blast signal from the siren of the *Blackwater*. Gunner Penhallurick of the *Flirt* does not seem to have noticed

any sound signals. Commander Rose of the *Moy* deposed at the trial to hearing what he thought was a three-blast siren signal from the *Blackwater*, but admitted on cross-examination that the evidence which he had given at the court-martial more recently after the event ought to be treated as more correct, and in that evidence he had stated that, before he noticed the bow of the *Blackwater* swing to port, he heard one blast from a siren. Asked whether it might have been a whistle, Commander Rose said, "It might have been, although I did not think so at the time"; but he added, later on, that he should not think that on a fine clear night, such as this was, he should have any difficulty in distinguishing between a torpedo destroyer's siren and an ordinary steam whistle. The learned President, if we may, with all respect, say so, seems to have treated the blowing of a whistle, which the *Hero* did carry, and the blast from a siren, which she did not carry, as indistinguishable, for he says in his judgment, in regard to the evidence of Commander Rose, "Therefore, if he did, in fact, hear a one-blast signal, it must have been from the *Hero*."

So far we have dealt with the issue upon the question of the sound signal upon the assumption that Rallo's evidence supported the defendants' case. We are not sure that, having regard to the positive opposition of Irish's testimony, and Gracey's significant silence upon so important a matter, we should, even on that assumption, have felt ourselves justified in coming to the same conclusion as that which commended itself to the learned President. But he heard the evidence given, and we should have hesitated long before interfering with his judgment in such circumstances.

A careful examination, however, of Rallo's evidence, in the light of established or admitted facts as to the relative positions of the *Hero* and the *Blackwater* when the fatal porting of the former vessel took place, and as to the distance between the two vessels at that moment, has brought us to the opinion that the porting which he describes as accompanied by a one-blast signal was not the porting in question.

It is, we think, manifest that that porting, which put the *Hero* on a course to cross the bows of the *Blackwater* and, if she escaped collision with the *Blackwater*, to pass between the

C. A. 1911

THE HERO.

starboard and port lines of the 3rd division of the flotilla, took place at a time when the two vessels were so close to each other that a collision was rendered imminent unless the *Blackwater* took immediate steps to counteract the negligent and improper navigation of the *Hero*. There is clear evidence of this from the most important of the witnesses on both sides. Irish, in charge of the *Blackwater*, directly he saw the porting of the *Hero*, not content with at once giving the order "Port two turns," himself rushed to the wheel, pushed aside the seaman who was steering on the bridge, and with his own hands put the helm over, "so that," to use his own phrase, "there should be no mistake." He had seen the *Hero* from the time she was eight to ten cables distant, and he says that she was from three to four cables, that is to say, 600 to 800 yards, distant, and about one cable from the *Flirt*, when, by porting, she suddenly shut out her green and opened her red light and created a position of danger, which Irish evidently felt must be met by instant action. The combined speeds of the two vessels, as the learned President finds, would cover 730 yards in one minute. The proximity of the two vessels to each other at the time of the *Hero's* porting appears equally clear from the account which Gracey, the first officer of the *Hero*, and at the time in charge of that vessel, gave to the master of the *Hero*: "He (the *Blackwater*) was showing a red light and I ported a point, and just as I steadied the wheel again the destroyer starboarded his helm and shot across the bow." We know from Commander Warren that the order to starboard the helm was given by him when he got upon the bridge just before the collision, and the vessels were so close to each other that he thought that a collision was inevitable. If this be so, and Gracey is right in saying that he had only just ported a point and steadied when the starboarding of the *Blackwater* took place, it is clear that the porting of the *Hero* took place when only a short distance separated her from the *Blackwater*. When we know what happened, and what there was in fact time to do, between the porting and the collision which followed it, we have a safer guide than estimates and calculations of time, which, as the learned President observes in his judgment, "in such

circumstances are uncertain, even more so than estimates of distance."

The learned President, acting, we think, upon the evidence of Sub-Lieutenant Turnor, who was on board the *Moy*,—the last of the three vessels in the starboard line of the 3rd division—places the *Hero* when she ported, on the starboard side of the 2nd division, somewhere between the *Cheerful* and the *Flirt*, that is to say, at a distance of about five cables, or 1000 yards, from the *Blackwater*. Even if this longer distance of some five cables, instead of the shorter distance of three to four cables given by Irish, be taken as approximately the true distance between the *Hero* and the *Blackwater*, when the *Hero* by porting suddenly created the risk of collision, it is, we think, impossible to accept Rallo's porting accompanied by a one-blast signal. For this witness, whom the learned President thought to be a "truthful and an honest witness," although he "was at times confused in answering questions as to the lights which he saw, and was in some matters mistaken," positively and persistently asserts that the porting and the signalling to which he deposes occurred at a distance of not less than two miles, that is to say twenty cables, or 4000 yards, from the *Blackwater*. He asserts this in cross-examination by the Solicitor-General, repeats it in answer to a later question (adding that it was not just a little before the collision and he did not think there was any danger), and repeats it again in re-examination by counsel for the defendants, who, at the suggestion of the learned President, had pressed the witness to give the minimum, saying in answer to the question of counsel that the least distance was two miles. It is, in our judgment, plainly impossible to adopt this evidence of Rallo as to a porting at a distance of at least two miles as a description of the porting for the *Blackwater* which led to the collision. It is agreed that it was a fine clear night, and, after all reasonable allowance is made, as it ought to be made on such occasions, for a margin of error in the estimates of a witness as to distance, it seems to us impossible justly to treat Rallo's porting of the *Hero* at a distance of two miles with the actual, and, as we have termed it, fatal, porting of the *Hero*, whether that occurred at a distance of 600 to 800 yards, or, as the President has put it, somewhere between

C. A. 1911

THE HERO.

the *Cheerful* and the *Flirt*, that is to say, at about 1000 yards from the *Blackwater*. A distance of anything like two miles would place the *Hero* as she was when approaching the *Kale*, which was the leading vessel of the starboard column of the 1st division of the flotilla, and was steaming about thirteen cables ahead of the *Blackwater*. And probably it is a porting for the *Kale* which may be the explanation of Rallo's evidence. The evidence of Commander Pratt-Barlow of the *Kale* strongly confirms this supposition. At the commencement of his examination in chief he told the Court that he first sighted the *Hero* about half a mile ahead of his vessel, and shewing all three lights. He ported his "helm and altered course half a point to starboard, of course, and passed port to port. I cannot swear that she did, but my impression was that she altered course to starboard." The position of the *Hero* given by Rallo for the porting for the *Blackwater* would fit such a porting for the *Kale* as Commander Pratt-Barlow of the *Kale* thought had occurred. Be this as it may, it will not fit the porting for the *Blackwater*. In the face of Rallo's evidence on this point, apart from the "confusion in answering questions," and his "mistakes in some matters," to which the learned President refers in his judgment, we are unable, with sincere respect, to concur with the President in holding that the defendants' case as to the sounding of a one-blast signal when the *Hero* ported across the *Blackwater* was sufficiently established by the defendants' evidence.

There remains the question whether the omission of those on board the *Hero* to sound the one-blast signal at the time in question constituted a breach of art. 28. That article, so far as it is material to quote it for the purposes of the present case, provides that "when vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle or siren—viz., one short blast to mean 'I am directing my course to starboard,'" &c.

The contention of the respondents is that the *Hero* in porting as she did was not taking a course authorized or required by the rules. Their counsel argues, "Leave on one side our pleaded case that the *Hero* ported whilst the *Blackwater's* red light, as well

C. A. 1911

THE HERO.

as her masthead and green light, was open on the port bow of the *Hero*. Treat, if you please, that story as untrue, and adopt the appellants' contention that, when the *Hero* altered her course by porting, the two vessels were shewing green light to green light. If the *Hero* ported, and directed her course to starboard, under those circumstances she was not taking a course 'authorized or required by the rules,' but, on the contrary, she was taking a wrong and improper course—a course, therefore, in no sense 'required' by those rules which prescribe a particular course, or 'authorized' by the rules of general direction, such as arts. 27 and 29, within the interpretation placed upon the word 'authorized' by the Courts in *The Uskmoor* (1), *The Anselm* (2), and *The Bellanoch*." (3) We cannot accede to such a contention. If it were sound, the strange result would follow that in the present case, and in all like cases, a vessel which took a proper course either required by the rules or, as a seamanlike course, authorized by the rules, but which omitted to make the appropriate sound signal according to art. 28, would incur the penalty incident to statutory blame, whereas a vessel which in precisely the same circumstances took a wrong and unseamanlike course, neither required nor authorized by the rules, and gave no sound signal to indicate that course, would, so far as regards the absence of an appropriate sound signal, go scot free. We do not think that the language of art. 28, fairly and reasonably interpreted, involves such a conclusion. We do not think that the words " taking any course authorized or required by these rules " limit the application of the rule to the case of a course which, at the trial of a collision action, is found by the Court to have been authorized or required by the rules. We ought, it appears to us, to interpret the words as including any course alleged to have been taken by a vessel acting, whether under art. 27 or art. 29, or under the other articles, so as to avoid immediate danger. So that where, as here, a vessel charged in an action with having taken—in acting for the other vessel—an improper course, causing or contributing to a collision, asserts in that action, as the *Hero* does here, that the manœuvre was a proper

(1) [1902] P. 250. (2) [1907] P. 151.
(3) [1907] A. C. 269.

C. A. 1911

THE HERO.

course under the rules, she cannot successfully contend that because the Court holds that her story of the facts is an untrue story, and that upon the true facts the course taken by her was neither a course required nor authorized by the rules, she thereby gains exemption from liability from statutory blame for not sounding the signal appropriate to that course. It was a course which those in charge of the vessel professed at the time to take, and the owners of the vessel sought to justify in the action, as a course either authorized or required by the rules.

In the result, we are of opinion that the *Hero's* allegation that the port helm signal was sounded when she ported across the bows of the *Blackwater* has not been established, and that as the absence of that signal may, as the learned President has rightly found, possibly have contributed to the collision, the *Hero* must be deemed to blame for a breach of art. 28; and therefore the decree of the Court below on the claim and counter-claim must be amended by a finding that both vessels were to blame, and by the insertion therein of the necessary consequential directions.

With regard to costs, as the appellants have failed to establish that they were not to blame, and, in the result, both parties have been found to blame, there will be no costs in the Court of Appeal or in the Court below.

Solicitor for appellants (plaintiffs), the Commissioners for executing the Office of Lord High Admiral of the United Kingdom, and the officers and crew of H.M.S. *Blackwater: The Treasury Solicitor.*

Solicitors for respondents (defendants), owners of the steamship *Hero: Thomas Cooper & Co.*

T. L. M.

BROWNING *v.* BROWNING.

1911

March 27; *April* 10.

Divorce—Wife's Petition—Cruelty—Wilful or reckless Communication of Disease—Sufficiency of Evidence.

In order to establish a charge of legal cruelty against a husband for communicating a venereal disease to the wife it is not necessary to allege or prove that he knowingly wilfully or recklessly communicated the disease: it is sufficient for the wife to allege and to prove that she was infected by the husband with a venereal disease; and the burden is upon him to prove that the disease was communicated in such circumstances as not to amount to legal cruelty.

The decision of the Full Court in *Morphett* v. *Morphett*, (1869) L. R. 1 P. & M. 702, disapproved and not followed. The dissenting judgment of Willes J. in that case approved and adopted.

This was a wife's petition for dissolution of her marriage on the ground of her husband's cruelty and adultery.

The petition was filed on September 29, 1910, and the alleged cruelty was contained in paragraph 3 (*d*) of the said petition, which was as follows: "That in the month of June, 1906, the respondent caused your petitioner to contract a disease which your petitioner has since ascertained to have been a venereal disease."

The husband entered no appearance.

The suit was undefended and came on for hearing on March 27, 1911, when the learned President expressed himself satisfied with the evidence of adultery, but reserved his decision in order to look into the question of cruelty.

The petitioner, in the course of her evidence, stated that there was a deed of separation, dated December 7, 1907, which was executed at her husband's request. Just before that, she heard that he had been living with a woman (named), but she had then no actual proof. Soon after he went to America, and she then made further inquiries.

Barnard, K.C. (*Haldinstein* with him), for the petitioner. The paragraph in the petition is not in the ordinary form. It is usual in such cases to allege that the husband communicated the disease to his wife wilfully or recklessly. But on behalf of

1911

BROWNING v. BROWNING.

the petitioner it is now submitted that if the husband is found to have communicated a venereal disease to his wife the presumption is that he did it knowingly or recklessly.

[SIR SAMUEL EVANS, PRESIDENT. I should be inclined to hold that the mere fact of communication of a venereal disease would be sufficient prima facie evidence of cruelty. But am I entitled so to hold, sitting as a Court of first instance? I wish to decide simply, if I can do so in view of the authorities, that the mere communication of disease is enough evidence of cruelty in the absence of any explanation of the circumstances. The text-books all say that the communication must be wilful or reckless.]

Barnard, K.C. The only cases where communication of a venereal disease has been held not to amount to cruelty are those in which the husband had consulted a physician and had been advised that it was perfectly safe for him to have intercourse with his wife; and the ground of the decisions in those cases was that he had not wilfully or recklessly communicated the disease.

[SIR SAMUEL EVANS, PRESIDENT, referred to the judgment of the Judge Ordinary (Sir Cresswell Cresswell) in *Brown* v. *Brown*. (1) The present petition does not contain the words "wilfully or recklessly," and there has been no substantive proof of knowledge or wilful or reckless conduct of the husband: therefore this case really raises the question I wish to decide; but I had better look further into the matter before giving judgment.]

Cur. adv. vult.

April 10. SIR SAMUEL EVANS, PRESIDENT. In this suit a question of law of considerable importance comes up for decision. Prior authorities upon it are conflicting. They range over a long period. They were pronounced from time to time when the law as to evidence and the competency of witnesses in matrimonial suits varied.

The question arises in this case first as a matter of pleading, and secondly as a matter of proof at the trial.

In substance, the question is whether a wife, who has been

(1) (1865) L. R. 1 P. & M. 46.

infected with venereal disease by her husband, must, in order to establish a charge of legal cruelty, prove affirmatively that the husband communicated the disease knowingly, wilfully, or recklessly; or whether it is sufficient for her to prove that she was infected by him, leaving upon him the burden of proving that the disease was communicated in such circumstances that it did not amount to legal cruelty.

The facts may be stated in a few sentences.

The wife petitioned for a dissolution of her marriage on the ground of adultery and cruelty.

The adultery was proved.

The cruelty relied upon was infection by gonorrhœa. The petition alleged the fact alone; there was no allegation that the disease was communicated knowingly, wilfully, or recklessly.

The husband filed no answer, and did not appear.

The infection by the husband was established. The wife did not, and could not, prove knowledge on the part of the husband. The strong probability is that she never would be able to find or adduce affirmative proof of such knowledge. She merely proved that she acquired the disease from him. Is that enough?

I will pass over the question of pleading. In most cases knowledge, or wilful or reckless conduct on the part of the husband, has been pleaded. I am willing to assume that in all cases heretofore such a plea has been made. I should be sorry if that concluded the question. Careful pleading in this Court is desirable, but, in the multifarious circumstances of matrimonial differences, decisions of important issues on narrow points of pleading are to be avoided. Putting aside for the moment the form of the petition, I proceed to deal with the point of substance.

The strongest authority against the petitioner is *Morphett* v. *Morphett*. (1) It was an application to make absolute a rule nisi for a new trial. The rule was argued before the Full Court, consisting of the Judge Ordinary (Sir James Wilde), Willes J., and Cleasby B. The husband had petitioned for restitution of conjugal rights. The wife in answer charged adultery and

(1) L. R. 1 P. & M. 702.

1911

BROWNING v. BROWNING.

The President.

cruelty, and prayed for a judicial separation. The cause had been heard before the Judge Ordinary and a special jury. The jury found that the husband had been guilty of cruelty. The only evidence in support of that finding was that the husband had in fact communicated an infectious venereal disease to the wife. The husband denied this, and gave evidence that he had never suffered from that disease. It was held by the Court (Willes J. dissenting) that there was not sufficient evidence to support the verdict; and the rule for a new trial was made absolute. Sir James Wilde said (1): "But the mere fact that a husband has communicated disease to his wife, whatever may be thought of it in other points of view, is not sufficient to constitute legal cruelty. It is abundantly clear that, for this purpose, the act must be a wilful one; and, according to the judgment of Dr. Lushington in *Collett* v. *Collett* (2), the proof of it 'requires very strong and conclusive evidence.' The very important question, therefore, arises whether, in the mere fact that the wife was diseased, any evidence is to be found to sustain the proposition, not only that the husband infected her, but that he did so knowingly and wilfully. It devolved upon the respondent" (i.e. the wife) "to establish affirmatively that the petitioner, having the disease himself, knew, either from medical advice, or from the obvious character of the symptoms, that he had a disease, that it was an infectious disease, and that it existed in such a stage and form that connection with his wife was at least distinctly dangerous." And he further says (3): "It was, I think, absolutely incumbent upon the respondent, in the absence of actual proof on this head, to lay the foundation for a scientific conclusion which should take its place, and from which the jury could argue with reason, first, to the charge of knowledge, and, through that, to the charge of wilfulness. It was part, and the most essential part, of the burden of proof which her charge of cruelty cast upon her; and the defect in its proof leaves her case, in my judgment, unsupported by sufficient evidence to sustain the finding of the jury."

(1) L. R. 1 P. & M. at p. 704. (2) (1838) 1 Curt. 678, at p. 679.
(3) L. R. 1 P. & M. at p. 705.

Cleasby B. concurred.

Willes J. delivered an important dissenting judgment, to which I shall advert hereafter.

It does not appear from the report whether a submission was made at the trial that there was no evidence to go to the jury, or how the question was left to them. The whole evidence, for and against, was apparently put to them. The facts of the case were peculiar; but it would seem that the decision must be taken to be that proof of the fact of infection of the wife by the husband, without proof of knowledge on his part, is not sufficient to support a charge of legal cruelty.

If so, I must consider whether it is binding upon me. This I shall do later, after discussing the earlier cases, including the only case (*Collett* v. *Collett* (1)) referred to by the learned Judge Ordinary in his judgment.

The first case I refer to is *Popkin* v. *Popkin*. (2) It was a decision of Lord Stowell on the validity of the libel in a suit by the wife in the Consistory Court for adultery and cruelty. (A "libel" was, of course, the first plea given in by a party instituting a divorce suit in the Ecclesiastical Courts.) Dealing with the allegation of cruelty, Lord Stowell said: "Here he" [the husband] "attempted to draw her to his bed when infected with venereal disease; an injury of a most malignant kind, and attempted in the most improper and violent manner. It has been said that he was unconscious of this malady: that is for him to shew; though it is improbable at present that he should succeed in establishing his ignorance." It is to be observed that no disease was communicated. Lord Stowell nevertheless admitted the libel.

The next case, *Collett* v. *Collett* (3), is the one cited by Lord Penzance in *Morphett* v. *Morphett*. (4) The wife alleged cruelty and adultery. Dr. Lushington in his judgment says: "I have no doubt that the deliberate communication of the venereal disease to his wife would constitute the offence of cruelty. . . . . That the disease was contracted by him, and that his wife was thereby infected, are admitted by him in plea and by

(1) 1 Curt. 678.
(2) (1794) 1 Hagg. Ecc. 765.
(3) 1 Curt. at p. 679.
(4) L. R. 1 P. & M. 702.

1911

BROWNING v. BROWNING.

The President.

his counsel; but I think, that to establish so serious a charge against him, as that he knowingly and wilfully communicated this disease, requires very strong and conclusive evidence."

Then comes the case of *Ciocci* v. *Ciocci*. (1) That was a suit in the Consistory Court of London brought by a wife for a divorce a mensa et thoro on the ground of cruelty and adultery. The cruelty charged was wilfully marrying while infected with venereal disease. The decision was that wilfully risking the infection, without the actual communication of the disease, did not constitute legal cruelty. But a passage or two from the judgment of Dr. Lushington may usefully be cited. He says (2): "The 6th article charges, that Mr. Ciocci before, at, and after his marriage was suffering from the venereal disease; that he was attended by divers medical persons; that he was warned against the risk of communicating the disease if he then married; that he did marry, and did communicate the disease to his wife. If these averments are proved, I should, both on principle and authority, entertain no doubt in deciding that an act of legal cruelty had been committed. The proof necessary to establish such charges is twofold: evidence that Mr. Ciocci himself had the disease, and evidence that his wife was also affected thereby." Later on (3) he enunciates the principle that "whoever does an act likely to produce injury, and the injury follows, can never excuse himself by saying, that he hoped a probable consequence might, by some peculiar good fortune, not follow." An echo of this case can be heard in the words of Willes J. in *Morphett* v. *Morphett*. (4)

The next case is *Chesnutt* v. *Chesnutt*. (5) I refer to it in order to cite a dictum of Dr. Lushington at pp. 200, 201, where (after considering the question of a cutaneous and not a venereal disease) he says: "The communication of the venereal disease is another and a very different question; the communication of such disease, in almost every possible case, imports adultery, and the bare communication, without reference to the knowledge of the husband, or, rather, perhaps, on the presumption of

(1) (1853) 1 Spinks, 121.
(2) Ibid. at p. 129.
(3) Ibid. at p. 130.
(4) L. R. 1 P. & M. 702, at p. 708.
(5) (1854) 1 Spinks, 196.

knowledge, has been held to be legal cruelty." This appears to be a considerable advance in favour of the injured wife upon the doctrine set forth in a passage already cited from the judgment of the same learned judge in *Collett* v. *Collett.* (1)

Now, before examining the later cases, it is important, and, in my view, essential, to note what the state of the law as to evidence and the competency of husbands and wives as witnesses in matrimonial and divorce causes was when the decisions heretofore referred to were pronounced.

Before 1843 (2) no person interested in a suit could give evidence.

In 1851, when parties to legal proceedings, speaking generally, were first authorized to give their testimony, an exception was made in respect of suits instituted in consequence of adultery. (3) In such suits the parties still remained incompetent to be witnesses; and when, by the Act of 1853 (4), husbands and wives of parties were made competent witnesses, a similar exception was made in respect of suits instituted in consequence of adultery, which still kept the husbands and wives outside the category of admissible witnesses.

In 1859 an Act was passed (5) which enabled the wife and husband to give evidence, limited to certain issues, in suits of a particular kind, namely, where the wife petitioned for a dissolution of marriage on the ground of adultery coupled with cruelty or desertion, they were in such a case empowered to give evidence of or relating to the cruelty or desertion, but not of or relating to adultery.

This slice of reform only applied to suits by the wife where she petitioned for dissolution. Where a husband petitioned for dissolution on the ground of the adultery of his wife, and she pleaded counter-charges of cruelty and desertion against him in support of a prayer for a judicial separation, it was held that the wife's evidence was inadmissible. (6)

(1) 1 Curt. 678.

(2) Evidence Act, 1843 (6 & 7 Vict. c. 85), s. 1.

(3) Evidence Act, 1851 (14 & 15 Vict. c. 99), ss. 2 and 4.

(4) Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83), ss. 1 and 3.

(5) Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 6.

(6) *Whittal* v. *Whittal and Hunt*, (1860) 30 L. J. (P. & M.) 43.

1911

BROWNING v. BROWNING.

The President.

Where a wife did not claim a dissolution, but only brought her suit for judicial separation, where adultery and cruelty were alleged, it was decided by Sir James Wilde as Judge Ordinary that the wife could not be called as a witness (1); and therefore presumably a husband in such a suit was also precluded from giving evidence. But it is curious to note that in a similar case, decided by his predecessor (Sir Cresswell Cresswell) the year before, both the petitioner and respondent seem to have been allowed to give evidence. (2)

It was not until 1869 (3) that husbands and wives were made competent witnesses in all divorce and matrimonial causes.

In the decade between 1859 and 1869, in the somewhat chaotic state of the law, five cases were decided and reported which have reference to the question raised in the present suit, namely, in 1860, 1862, 1865, 1866, and 1869, to which reference must be made.

The case of *Jones* v. *Jones* (4) was a suit for divorce by the wife on the ground of adultery and cruelty. The cruelty charged was that in 1857 the respondent had wilfully infected the petitioner with gonorrhœa. There was no appearance or defence by the respondent. The case was heard by the Full Court (Sir Cresswell Cresswell J.O., Channell B., and Keating J.). The Full Court was only acting as a Court of first instance. The learned Judge Ordinary in the course of his judgment said: "It is said there are grounds which should induce the Court to believe that the respondent communicated that disease to the petitioner wilfully, or at all events, that he knew that he was in a condition which made it probable that he would communicate it (as in the case of *Ciocci* v. *Ciocci* (5)), and that he was perfectly reckless whether he communicated it or not. I subscribe to every word that has been read of Dr. Lushington's judgment in that case." Upon the facts the petition was dismissed.

The next case was *N.* v. *N.* (6), already referred to on the question of admissibility. Sir Cresswell Cresswell J.O. there said:

(1) *Hudson* v. *Hudson*, (1863) 3 Sw. & Tr. 314.

(2) *N.* v. *N.*, (1862) 3 Sw. & Tr. 234.

(3) Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 3.

(4) (1860) Searle and Smith's Reports, 138, at p. 140.

(5) 1 Spinks, 121.

(6) 3 Sw. & Tr. 234, at p. 239.

"If I had been of opinion that she suffered real and not simulated gonorrhœa, two questions would remain—first, whether it was wilfully communicated, as to which the Court has nothing to guide it but mere conjecture; and secondly, had it been condoned?"

Now come the last three decisions in this period preceding the Evidence Act, 1869 (1), two of which were decided by Sir James Wilde (afterwards Lord Penzance) alone, and one by a majority of the Full Court over which he presided. It is not easy to reconcile them.

In the case of *Brown* v. *Brown* (2) the wife petitioned for dissolution on the ground of adultery and cruelty. The cruelty relied upon was that the husband infected his wife with syphilis, and the allegation was that he knowingly communicated the disease to her. The facts are of a loathsome character. The husband appears to have suffered from another venereal disease, but there was no proof that he had ever contracted syphilis. He appeared, but gave no evidence, and called no witnesses. Sir James Wilde delivered a considered judgment, from which I cite the material passage: "I quite concur in the argument that the communication of disease by the husband to the wife will only amount to an act of legal cruelty, if it be wilful. But the proof of this wilfulness may reasonably be sought in surrounding circumstances, in the condition of the husband, and in the probabilities of the case, after such explanations as the husband may offer. Prima facie, it is fit to conclude that the husband's state of health would be within his own knowledge, though he may rebut this by his own oath (when admissible as a witness), or by such other proof as may be within his reach. In the present case the petitioner was proved to have been twice infected, at a considerable interval of time, during the cohabitation. The respondent, though a competent witness, did not present himself at the hearing to assert his ignorance, or establish his innocence of wilful wrong." The petition succeeded, and a decree dissolving the marriage was pronounced, although no affirmative evidence of knowledge, wilfulness, or recklessness was given.

(1) Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68).

(2) L. R. 1 P. & M. 46, at p. 50.

1911

BROWNING v. BROWNING.

The President.

In *Boardman* v. *Boardman* (1) the trial was upon the intervention of the Queen's Proctor. Sir James Wilde, having summed up to the jury on the question of cruelty, refrained from pronouncing a decree till the following day, when he delivered a judgment after consideration of the correctness of the ruling which he had given to the jury. The case is not very helpful in determining the question of how much proof the injured wife must give. The direction to the jury was given partly in the summing up, and partly in answer to questions. After citing *Jones* v. *Jones* (2) and *Ciocci* v. *Ciocci* (3) as authorities that the communication of a disease, in reckless disregard of the chances or probabilities of causing infection, was legal cruelty, the learned Judge Ordinary said that the jury adopted the term "reckless," and found the cruelty proved, and he pronounced a decree accordingly.

The last of these cases was *Morphett* v. *Morphett* (4), from which I have already cited, and which I have said is the strongest authority against the petitioner in the present suit. I find no considered reported decision upon the point now raised since the passing of the Evidence Act, 1869 (5); although I think the practice has been for the petitioner to plead knowledge, or wilful or reckless conduct, on the part of the respondent, and probably also to adduce proof in support of that plea.

Is, then, the judgment of the majority of the Court in *Morphett* v. *Morphett* (4) binding upon me? I hope and think that it is not.

I need not go into the history of the enactments as to jurisdiction at various times of the Judge Ordinary and of the Full Court. When *Morphett* v. *Morphett* (4) was decided the Judge Ordinary sitting alone had equal power with the Full Court in ordering new trials (6); in other words, the Judge Ordinary sitting alone could have decided *Morphett* v. *Morphett* (4); and the Full Court was not exercising any appellate jurisdiction over

(1) (1866) L. R. 1 P. & M. 233.

(2) Searle and Smith's Reports, 138.

(3) 1 Spinks, 121.

(4) L. R. 1 P. & M. 702.

(5) Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68).

(6) Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), s. 1.

him. So far, therefore, as the decision is concerned, apart from the number or authority of the learned judges, it is not superior to one which the Judge Ordinary alone could have pronounced. It appears to me that the decisions of the various Courts of equal jurisdiction are, to say the least, of doubtful consistency.

In these circumstances, having regard to the various opinions expressed in the judgments which have been cited, and to the state of the law of evidence in matrimonial suits at the dates of those judgments and at the present time, I conceive that I am not bound to follow the judgments of the majority of the Court in *Morphett* v. *Morphett* (1), and that I am free to give my own decision unfettered by that case.

The judgment of Lord Penzance in *Brown* v. *Brown* (2) appeals to me more strongly than his judgment in *Morphett* v. *Morphett*. (1) The principles propounded by Willes J. in his dissenting judgment in the latter case stand out as eminently fair and sound, and I adopt them without hesitation. An innocent wife, who is infected with disease of the nature referred to, suffers a loathsome degradation and a foul and incalculable injury. Some wives are endowed with sufficient grace and power to forgive in such a case; others affected by the taint and poison, and afflicted with the sense of grievous wrong, would, not unnaturally, desire to be separated and set free from the perpetrator of the wrong. In order to obtain this freedom the indignity of having to prove the infliction is serious enough. There ought not to be added to the indignity and the injury the trouble and difficulty, sometimes amounting to impossibility, of bringing home knowledge or wilful misconduct to the wrongdoer.

Cases may, of course, arise where a husband can prove that a venereal disease (like syphilis) was contracted by him innocently, or that he may have communicated a disease in innocence or ignorance, and that he is not guilty of what the law regards as cruelty. It is not necessary to give examples. In such cases the burden of adducing such proof should be upon him, and not upon the suffering wife. What I have said makes it unnecessary to say anything more upon the point of pleading. The petitioner

(1) L. R. 1 P. & M. 702. (2) L. R. 1 P. & M. 46.

1911

BROWNING v. BROWNING.

The President.

in this case pleads every material fact necessary to entitle her to the relief she prays when the facts alleged are found.

What I decide to-day is that a wife establishes prima facie a charge of legal cruelty against her husband when she proves that she is a guiltless woman, and that a venereal disease has in fact been communicated to her by him. When that has been done, it is for the husband, if he can, to prove that he was ignorant, or innocent, or otherwise not guilty of the legal cruelty charged against him.

I pronounce a decree nisi with costs and custody of the child.

Solicitor for petitioner: *George W. Cook.*

H. D. G.

1911

April 10.

IN THE ESTATE OF BARON HERMANN FRIEDRICH CARL VON BRENTANO, OTHERWISE BARON FREDERIC DE BRENTANO.

Probate—Practice—Foreign Domicil—English Will of English Realty—German Will of General Estate—Separate Executors—Limited Grant to Persons entitled to General Grant—Cæterorum Grant—Rules and Orders, 1862, *r.* 30—*Rules and Orders*, 1863, *r.* 35.

The Court may, if it think fit, depart from the usual practice of refusing a limited grant to a person entitled to a general grant of probate.

A testator, domiciled abroad, left an English will dealing exclusively with realty in England and appointing English executors; and he left also a foreign will, appointing a foreign executor and dealing with all the rest of his estate, which included personalty in England.

The Court granted to the English executors probate of the English will, and made a cæterorum grant in favour of the foreign executor.

THESE were two consent applications, by motion, which came on for hearing at the same time on April 10, 1911: one by the executors under an English will, dated October 8, 1902, for a grant to them of probate, limited to the real estate of the deceased in England; and the other, by the executor under a German will, dated October 2, 1909, for a grant to him of probate of the said will, as contained in a duly certified copy thereof, limited to the personal estate in England of the deceased.

The deceased died in Germany on October 5, 1909, having

1911

VON BRENTANO, IN THE ESTATE OF.

acquired a German domicil. On October 8, 1902, the deceased duly executed a will, according to English law, dealing solely with realty in England and appointing executors in England; this was ratified by a will, duly executed on October 2, 1909, according to German law, and dealing with the whole of the deceased's estate, including his personalty in England, and appointing a German executor.

The personalty in England, consisting of foreign and colonial bonds and railway and other stocks, was of the value of 7564*l.*; and the real property in England consisted of the moiety of a building now known as The Outer Temple, 222 to 225, Strand, London, the testator's interest therein being of the estimated value of 16,450*l.*

His estate in Germany was also of considerable value.

Barnard, K.C. (*Willock* with him), for the executors under the English will. The question is whether the executors are entitled to a grant limited to the real property comprised in the English will, or whether there must be a grant in respect of the English and German wills together.

Under the Land Transfer Act, 1897 (1), the real estate becomes vested in the personal representatives of the deceased; and sub-s. 3 deals with a grant of probate of a will relating exclusively to realty.

It would be inconvenient for the executors under the English will to take a joint grant with the German executor. There is only one rule, and that only a rule of practice, against a limited grant, namely, that a person who is entitled to a general grant should not take a limited grant.

The only reported case in which this rule was not followed was that of *Patteson* v. *Hunter and Another* (2), and the same should be done in the present case as was there done.

The Land Transfer Act, 1897 (3), has not made any difference to the practice.

[SIR SAMUEL EVANS, PRESIDENT. Does r. 35 of the Rules and Orders, 1863, apply only to a district registry?]

(1) 60 & 61 Vict. c. 65, s. 1, sub-s. 1.

(2) (1860) 30 L. J. (P. & M.) 272.

(3) 60 & 61 Vict. c. 65.

1911

VON BRENTANO, IN THE ESTATE OF.

Barnard, K.C. It has prevented a registrar from giving a limited grant without an application to this Court.

Hume Williams, K.C. (*Le Bas* with him), for the executor under the German will, supported the application. They referred to r. 35 of Rules and Orders of 1863.

SIR SAMUEL EVANS, PRESIDENT. In this case I think I can allow the limited grant asked for. It is clear that the testator intended his estate to be administered by two separate sets of executors.

In his German will he deals with all his property, excepting only his English real estate.

In his English will he deals with the English realty only, and appoints Mr. Rawle and Mr. Gregory executors of that will.

There appears to have been a rule of practice against granting a limited administration to any persons entitled to a general grant. Notwithstanding that rule and the practice followed in the principal registry, the Judge Ordinary made a limited grant in the case of *Patteson* v. *Hunter and Another*. (1)

Rule 30 of the Rules and Orders, 1862 (2), applies to the principal registry, and r. 35 of the Rules and Orders, 1863 (3), governs the practice in the district probate registries. Those rules are not identical; but, even under the latter, limited administration may be granted with the consent of the judge.

It is obviously convenient that a grant should be made in this case to the English executors, limited to the realty in England.

There will be a cæterorum grant to the German executor.

Solicitors for the English executors: *Rawle, Johnstone & Co.*

Solicitors for the German executor: *Toller & Sons.*

(1) 30 L. J. (P. & M.) 272.

(2) Rules and Orders, 1862, r. 30: "No person entitled to a general grant of administration of the personal estate and effects of the deceased will be permitted to take a limited grant, except under the direction of the judge."

(3) Rules and Orders of 1863, r. 35 (which is identical with r. 29 of Rules and Orders of 1862): "Limited administrations are not to be granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, except under the direction of a judge."

H. D. G.

WILLIAMS *v.* EVANS AND ANOTHER.

1911
May 18.

Will—Probate—Executor Next of Kin—Action by Executor for Revocation of Probate—Knowledge of all Facts at Date of Probate—Estoppel—Laches.

An executor, who is also next of kin of the testator, and who takes probate with knowledge of all the facts, is not disabled from taking proceedings to contest the validity of the will in the same manner as a bare executor would be under similar circumstances. The fact of his having taken probate, if a reasonable explanation is given for having done so, does not estop him from afterwards instituting proceedings to disaffirm the will.

Whether there have been laches on the part of the person disputing a will is a question of fact. A certain amount of delay on the part of an executor, who is also next of kin, in instituting proceedings to prevent probate, does not necessarily amount to negligence on his part or warrant the Court in holding, notwithstanding that he had all along full knowledge of the facts, that it would be inequitable to allow him to proceed to impeach the will, especially if the assets have not been distributed and if his conduct has not led other persons to alter their position to their own detriment.

THIS was a matter which came up for argument under an order of Bargrave Deane J., dated May 15, 1911, which directed that the plaintiff and defendants should proceed to trial, without witnesses, of the preliminary point as to whether or not the plaintiff was estopped from taking these proceedings to obtain revocation of the probate of the will of the testator William Williams, deceased.

The facts, so far as they are material, were set out in a document indorsed "alleged facts to be assumed for the purpose only of raising a preliminary point of law herein," and were as follows:—

"The plaintiff is the only child and next of kin of the testator by his first marriage.

"The testator died on November 29, 1908. On January 19, 1909, Elizabeth Williams, the widow of the deceased, obtained probate of an alleged will of the deceased dated September 26, 1906 She died on January 19, 1909, without issue.

"On February 1, 1909, the defendants obtained probate of the will of the said Elizabeth Williams dated December 5, 1908.

1911

WILLIAMS v. EVANS.

"The plaintiff did not join the said Elizabeth Williams for grant of probate as he then believed that the said will was not duly executed and that the testator was not, at the time when the said alleged will was executed, of sound mind, memory and understanding, and that the execution of the said will was obtained by the undue influence of the said Elizabeth Williams, and that his father at the time of the alleged execution of the same did not know and approve of the contents thereof.

"On March 16, 1909, the plaintiff consulted his solicitors with regard to contesting the said will, but his solicitors advised him that in their view it was then too late to oppose it, and that, in any event, he would not be prejudiced in taking proceedings to revoke the said will by then taking out probate.

"Acting upon his solicitors' said advice the plaintiff on May 7, 1909, took out double probate of the said alleged will.

"The plaintiff has acted as executor and intermeddled with the estate. All the facts upon which the plaintiff now relies to support the allegations contained in paragraph 6 were known to the plaintiff at the date when he took out double probate."

Barnard, K.C. (*R. W. Turner* with him), for the defendants. The question is whether the plaintiff is estopped from or whether his laches prevent him from disputing the will.

There is no reported case which covers this point. The case of *In the Goods of Chamberlain* (1) does not go nearly far enough. It was the case of a bare executor. There have been cases in which legatees under a will have received their legacies and have afterwards taken proceedings because they were entitled to larger benefits under an earlier will and desired to set up that will. If a person who takes probate does not know the real facts, of course he is not bound. The plaintiff here has taken the ordinary oath of an executor on taking double probate.

As to the question of laches, the law was discussed and considered by Barnes J. in *Mohan* v. *Broughton.* (2)

[HORRIDGE J. The plaintiff in that case had had the claim dealt with in 1894, and no proceedings were commenced until the middle of June, 1898. In the case before me there is no allegation

(1) (1867) L. R. 1 P. & M. 316. (2) [1899] P. 211.

that the fund has been distributed. Whether a person has been guilty of laches always depends on facts; it is not a necessary inference of law. What is alleged here is that, knowing the facts, he, under the mistaken advice of a solicitor, took double probate.]

Upon that case and upon the ground of estoppel the plaintiff is precluded from contesting this will. It is no answer to say that before taking probate he was advised by a solicitor. If that advice was wrong, his only remedy is by an action for negligence against the solicitor. The plaintiff admits that before he took probate he knew all the facts which are now within his knowledge.

Llewelyn Williams, for the plaintiff. There appear to be no other reported cases than those already referred to. A person who has a grievance ought to be allowed to come to the Court unless there is distinct authority against the proceeding.

The case of *In the Goods of Chamberlain* (1) is not in point here, and the facts in that case were very different from those which are now before the Court.

The question as to whether the plaintiff has been guilty of laches is entirely a question of fact, and on the facts he has not been so guilty.

The facts in the case of *Mohan* v. *Broughton* (2) are very different from those in the present case, and in that case and the two cases of *David* v. *Frowd* (3) and *Sawyer* v. *Birchmore* (4) cited in the judgment the estate had been distributed.

The real question is whether the act of obtaining probate is a judicial act so as to estop the plaintiff from questioning the validity of the will. The plaintiff's affidavit on applying for probate was a proper one to make at the time it was made.

In the Goods of Chamberlain (1) is the only reported case where there is any suggestion of estoppel because the person seeking to question the validity of the will has already taken probate. The head-note in that case goes too far, and that case has never been followed or referred to in any subsequent reported case.

The plaintiff in the present case is not estopped, nor has he

(1) L. R. 1 P. & M. 316.
(2) [1899] P. 211.
(3) (1833) 1 My. & K. 200.
(4) (1836) 1 Keen, 391, 825.

1911

WILLIAMS v. EVANS.

been guilty of laches, and he ought to be allowed to proceed with the action to contest the validity of the will.

HORRIDGE J. (after reading the order directing the issue). Although the word in the order is "estopped," I think I ought to deal with the whole question.

There are two questions which I have to decide.

First, does the fact of the plaintiff having taken out probate, as a matter of law, prevent him disputing the will?

Three things are necessary to constitute estoppel: (1.) a representation made; (2.) that it is untrue; and (3.) that the party to whom it is made has acted on it to his detriment. In any view I do not think this is a case of estoppel. The question really is, is there any rule of the Probate Court which prevents the plaintiff who has taken out probate from taking proceedings to impeach the will?

The only reported authority on this point is *In the Goods of Chamberlain* (1), in which case the only title the executor had was as an executor who had clothed himself with probate. Towards the end of his judgment Sir J. P. Wilde said (2): "He had an interest under the will, because he was an executor of it, but his title rested on the will, and stood or fell with it; and it would be a strange thing to hold that, because he was named executor if there was a will, therefore he had an interest in shewing there was not."

The present case is quite different from that, and therefore the case of *In the Goods of Chamberlain* (1) does not bind me.

In the absence of authority, if the plaintiff has a real honest case he ought to be allowed to have it dealt with by the Court.

Secondly, there is the question of laches.

The case of *Mohan* v. *Broughton* (3) is very much stronger on the facts than the present case. In the course of his judgment in that case Gorell Barnes J. deals with this question of laches. He says (4): "It is clear that there is a broad distinction between the position of a person who had no notice of the proceedings in an administration suit in which a fund has been distributed, and

(1) L. R. 1 P. & M. 316.
(2) Ibid. at p. 319.
(3) [1899] P. 211.
(4) Ibid. at p. 218.

who, upon becoming aware of the facts, seeks to make the recipients refund, and that of a person who, with notice of such proceedings and with knowledge of the questions which can be raised therein, neglects to contest the matters upon which his rights, if any, depend, and allows the fund to be distributed; and then, after a time, seeks to reopen the whole matter."

There is no evidence in this case that the parties have distributed the assets among themselves. In a later part of his judgment Gorell Barnes J. says (1): " . . . . and, notwithstanding that knowledge, she took no steps, for three years at least after the money had been distributed amongst the next of kin, to question the Chancery proceedings and the orders made therein."

The only alteration in the position of the parties that can here be alleged is that during the wife's survivorship of her husband, a period of about seven weeks, no proceedings were taken, and that owing to her death her evidence is not now available, but this was not relied upon as being a delay of such a character as amounted to laches.

One matter relied upon was the taking out of double probate, but I think the plaintiff has on the assumed facts as stated given a satisfactory explanation as to why he made the affidavit.

On the whole I cannot say the facts in this case are such that I am able to hold that there has been such laches that it would be inequitable for the plaintiff to be allowed to contest the validity of this will.

On the question of costs, I am of opinion that this was a fair question to be raised and argued, and therefore the costs should be costs in the action.

Solicitors for defendants: *Holt, Beaver & Crowdy, for W. J. Williams, Cardigan.*

Solicitors for plaintiff: *Lloyd George, Roberts & Co., for Gee & Edwards, Swansea.*

(1) [1899] P. 211, at p. 220.

H. D. G.

1911
May 15.

QUARTERMAINE *v.* QUARTERMAINE AND GLENISTER.

Divorce — Practice — Costs — Co-respondent — Decree Nisi — Reconciliation of Petitioner and Respondent — Motion to rescind Decree — Fresh Order, condemning Co-respondent in Costs.

The petitioner and respondent in a suit for divorce having become reconciled after the decree nisi and before decree absolute, the petitioner moved to rescind the decree and dismiss the petition.

The Court directed that the order rescinding the decree nisi and dismissing the petition should contain a provision condemning the co-respondent in the costs of the petition, as taxed.

DIVORCE MOTION.

On November 21, 1910, a decree nisi was pronounced and the co-respondent was condemned in costs.

On December 9, 1910, an order was made that the co-respondent should, within seven days after service thereof, lodge in Court the sum of 64*l.* 18*s.* 1*d.*, the amount of the costs, as taxed.

The order had not been served, owing to the whereabouts of the co-respondent not being known to the petitioner. He had not complied with the order, and no notice of the present application had been served upon him.

The petitioner had agreed that after the present application he would resume cohabitation with the respondent. The petitioner intimated that he would not apply to have the decree made absolute, and the respondent, in her affidavit, submitted that the petition should be dismissed for want of prosecution.

The King's Proctor had been communicated with and had written to the petitioner's solicitors assenting to the present application.

The case on motion asked for an order rescinding the decree nisi and dismissing the petition and discharging the order for costs against the co-respondent or for such further or other order as might be just.

Rayden, for the petitioner, now asked that the decree might be rescinded except so much of it as condemned the co-respondent

1911

QUARTER-MAINE v. QUARTER-MAINE AND GLENISTER.

in costs. He cited *Hyman* v. *Hyman and Goldman, The King's Proctor shewing Cause.* (1)

[BARGRAVE DEANE J. In that case there had been a successful intervention by the King's Proctor, which enabled the Court to make practically a fresh order as to costs. The difficulty here as a matter of practice is in severing the decree.]

Bremner v. *Bremner and Brett* (2) is an authority for condemning the co-respondent in costs notwithstanding the dismissal of the petition.

BARGRAVE DEANE J. There will be an order, rescinding the decree nisi and dismissing the petition. This order will contain a provision condemning the co-respondent in the costs of the petition, as taxed.

Solicitors: *Woodroffes & Ashby.*

H. D. G.

CURTIS AND OTHERS *v.* BEANEY AND OTHERS.

1911

May 2, 5.

Probate—Practice—Production of Documents—Affidavit—Privilege—Briefs for Counsel.

Upon an application, in probate proceedings, for inspection of certain documents admitted to be in the possession of opposing parties, who objected to produce them:—

Held, that the objection was good, for the documents were privileged, being briefs prepared confidentially by the direction of the solicitor for the deceased, the sole defendant in a former action, and as a confidential communication between the solicitor and the counsel briefed on her behalf, solely with the object and purpose of enabling the counsel to conduct her defence, and on the appeal from the judgment in that action.

THIS was a summons taken out on behalf of C. P. Cooper, one of the defendants, against A. Bowie and P. W. Bullock, two of the plaintiffs (the other plaintiff, Curtis, having severed), to shew cause why an order made by the registrar on April 4, 1911, should not be reversed, and that the plaintiffs Bowie and

(1) [1904] P. 403. (2) (1864) 3 Sw. & Tr. 378.

1911

CURTIS v. BEANEY.

Bullock be ordered to produce to the applicant the briefs delivered to counsel in a common law action *Reeder* v. *Cooper* referred to in the first paragraph of the said plaintiffs' affidavit sworn on March 30,1911, in opposition to this application. In this paragraph the deponents admitted having in their possession the brief delivered to counsel on behalf of the deceased on the trial of an action in the King's Bench Division entitled *Reeder* v. *Cooper*, and also the brief delivered to counsel on the appeal to the Divisional Court from the said judgment; and they further deposed that the claim in the said action was in respect of an account alleged to be due to a jobmaster and livery stable keeper; and the deceased, who was the sole defendant to the said action, counterclaimed therein for an account of all moneys received by the plaintiff Reeder from her, or on her account. The deponents objected to produce the said briefs or either of them.

Bayford, for the applicant.

G. M. Simmonds, contra, relied upon *Walsham* v. *Stainton* (1) and *Nicholl* v. *Jones*. (2)

Cur. adv. vult.

May 5. BARGRAVE DEANE J. In this case a summons was taken out before the President (Sir Samuel Evans), and he adjourned it into Court for argument. Although he heard it in chambers, and then adjourned it into Court for further argument, the matter is now brought before me, and I have to deal with it.

It is a case in which the will of Miss Maria Sabina Cooper is in question, one of the points raised in the pleadings being whether she was of sound mind at the time when she executed her last will.

One of the two plaintiffs, against whom this summons has been taken out, was the lady's own solicitor. He and the other two plaintiffs are named as executors in the last will.

In the lifetime of the testatrix proceedings appear to have been taken against her for money alleged to be due, and the present solicitor-plaintiff acted as solicitor for her in those proceedings.

(1) (1863) 2 H. & M. 1. (2) (1865) 2 H. & M. 588.

1911

CURTIS v. BEANEY.

Bargrave Deane J.

He prepared briefs for counsel, and the client was not called as a witness. She is now dead, and it is said that the present applicant, who is one of the defendants in the action now pending touching the validity of her testamentary dispositions, is entitled to have inspection of the briefs that were prepared by the present solicitor-plaintiff, and that, inasmuch as he was representing the deceased lady in the matter, those briefs are practically her instructions and not his.

With regard to that I have to look and see what is in the affidavit of Alexander Bowie and Percy William Bullock, the two plaintiffs in question. They say this: "The briefs are privileged from production, having been prepared confidentially by the direction of one of us, namely the said Percy William Bullock, acting as solicitor for the defendant in the said action, and as a confidential communication between the said Percy William Bullock and the counsel briefed on behalf of the defendant to the said action, solely with the object and for the purpose of enabling the said counsel to conduct the defence of the defendant to the said action upon the hearing of the trial thereof and the appeal to the Divisional Court on behalf of the defendant to the said action from the judgment given at the said trial."

It is suggested that the defence was that she was of unsound mind when the alleged transaction was entered into. I have no evidence to that effect, and the matter is certainly left in doubt as to what the real defence was. If the lady herself had given instructions for these briefs, then, on the principle that whatever the deceased person whose will is in dispute said is material, that would have affected my judgment, because it is of vital importance in this Court that the judge or jury should know all that can be known of the sayings and doings of the deceased person. But when I find it is sworn that the briefs were confidentially prepared by the solicitor for the use of counsel, and for him to use or not as he thought fit, then I think this is not within the principle applicable to acts done by the deceased lady herself. I am therefore of opinion that the present application has not been brought within the principles of the probate practice.

Then I am thrown back on general principles and practice, and

1911

CURTIS v. BEANEY.

Bargrave Deane J.

I find that the cases do not shew it to be the practice in the Courts, and that there is no fixed rule that a brief prepared for and delivered to counsel should be disclosed to the parties in an action. I need only refer to two cases, both reported in one and the same volume. (1)

I think this summons fails, and that in this action I ought not to order that the briefs in question be included in the affidavit of discovery without privilege and be inspected.

Application dismissed. Costs reserved to be dealt with at the trial.

Solicitors for the applicant (C. P. Cooper): *Tarry, Sherlock & King.*

Solicitors for the two plaintiffs (Bowie and Bullock): *Bullock & Co.*

H. D. G.

1911

June 19.

SHORTER *v.* SHORTER AND OTHERS.

Probate—Practice—Administration with Will annexed to Executor of Residuary Legatee—Suit for Revocation of Probate of Will of such Legatee—Appointment of Administrator and Receiver pendente lite to act as to both Estates.

A. died making B. his executor and residuary legatee. Eight days later B. died without having proved A.'s will. On the day B. died she was alleged to have executed a will naming C. as her executor. C. proved this will and then obtained letters of administration to the estate of A. with his will annexed.

D. brought a suit against C. and others for revocation of the probate of B.'s will. An application by C. to appoint him administrator and receiver pendente lite in the estate of B., was opposed by D., and the Court ordered the appointment of an independent person with power to act as to both estates.

PROBATE MOTION.

This was an application on behalf of the three defendants that George David Shorter, one of them, might be appointed as administrator of the personal estate and receiver of the real estate

(1) *Walsham* v. *Stainton*, 2 H. & M. 1; *Nicholl* v. *Jones*, 2 H. & M. 588.

1911

SHORTER v. SHORTER.

of the deceased pending the determination of the action, or that directions might be given to him for the preservation of the estate of the deceased pending the determination of the action.

The facts, so far as material for the present purpose, were as follows:—

The deceased, Caroline Shorter, died on December 10, 1910, possessed of or entitled to certain real and personal estate as the residuary legatee under the will of George David Jones, who recently predeceased her, having died on December 2, 1910, without having obtained probate of such will. On January 21, 1911, probate of an alleged will of Caroline Shorter, purporting to have been executed on December 10, 1910, was granted out of the Principal Probate Registry to the defendant George David Shorter, the executor named in the said alleged will, and on February 7, 1911, he also obtained letters of administration to the estate of George David Jones with his will annexed. On May 2, 1911, the plaintiff issued a writ claiming to be a lawful nephew, heir-at-law, and one of the next of kin of the deceased, and claiming revocation of the probate granted on January 21, 1911, a decree against the force and validity of the alleged will of December 10, 1910, and a grant of letters of administration to the estate of the said deceased.

Bayford, for the defendants, asked that George David Shorter, one of the defendants, should be appointed administrator and receiver pendente lite.

Rayden, for the plaintiff, contra. It would be quite contrary to the practice to appoint a party to the suit as administrator and receiver pendente lite, except by the consent of the opposite party or parties to the suit. The person appointed administrator and receiver pendente lite of the estate of Caroline Shorter, deceased, ought to have power to deal with the estate of George David Jones, deceased, and if the administrator did not voluntarily bring in the grant to that estate the Court could direct the administrator pendente lite to take steps to compel him. [He cited *In the Goods of Maria Dawes* (1) and *In the Goods of Fawcett.* (2)]

(1) (1870) L. R. 2 P. & M. 147. (2) (1889) 14 P. 152.

1911

SHORTER v. SHORTER.

SIR SAMUEL EVANS, PRESIDENT. Why should I not follow *In the Goods of Fawcett* (1)? I do not see why the administrator and receiver appointed by me cannot deal with both estates.

Referred to registrar to nominate a person to act as administrator and receiver pendente lite with power to act as to both estates.

Solicitors for defendants: *Parry & Gibson.*
Solicitor for plaintiff: *John S. Oldfield.*

H. D. G.

C. A.

1911

May 15.

[IN THE COURT OF APPEAL.]

CLARKE *v.* CLARKE AND LINDSAY.

Divorce—Practice—Variation of Settlements—Answer to Petition before Decree Absolute—Preliminary Investigation by Registrar—Jurisdiction—Matrimonial Causes Act, 1859 (22 *&* 23 *Vict. c.* 61), *s.* 5.

The Court has no jurisdiction either by itself or through its officers to hold any inquiry upon a petition to vary settlements until the decree for dissolution has been made absolute, and until that time the respondent to the petition is under no obligation to answer it.

APPEAL from an order of Bargrave Deane J.

On January 16, 1911, a decree nisi for divorce was pronounced upon the husband's petition. On March 4 the husband filed a petition for a variation of the marriage settlement, and this petition was served on the wife on March 22. By consent the time for answering the petition was extended over the Easter vacation. On April 21 the wife applied to the registrar to extend the time until one month after the decree absolute, the ground of the application being that under s. 5 of the Matrimonial Causes Act, 1859 (2), the Court had no jurisdiction to deal with

(1) 14 P. D. 152.

(2) Matrimonial Causes Act, 1859, s. 5: "The Court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit."

C. A. 1911

CLARKE v. CLARKE AND LINDSAY.

the petition until after the decree absolute. The registrar allowed an extension of fourteen days from the date of the application, being of opinion that, although no order could be made on the petition until after the decree absolute, the preliminary inquiry before him could proceed. On appeal Bargrave Deane J. varied the order of the registrar by directing the answer to be filed by June 12.

The wife appealed.

Barnard, K.C., and *Bayford*, for the appellant. Under s. 5 of the Matrimonial Causes Act, 1859, which gives jurisdiction to the Court to vary settlements, the Court has no power to make any inquiry or any order until after the final decree. By r. 95 of the Divorce Rules and Regulations applications to the Court to exercise the authority given by certain provisions of the Matrimonial Causes Acts, therein enumerated, which include the section now in question, are to be made in a separate petition which must be filed as soon as by the said statutes such applications can be made, or within one month thereafter. The application in this case ought to have been made by a separate petition within one month after the decree absolute, and the strict right of the appellant would be to have this petition taken off the file, but it is not necessary for her to apply to have the petition taken off, because although it remains on the file it cannot operate as a lis pendens until after the decree absolute: *Constantinidi* v. *Constantinidi.* (1)

Grazebrook, for the respondent. The head-note in *Constantinidi* v. *Constantinidi* (1) goes beyond the decision. There is nothing in the decision which warrants the view that upon a petition for variation of settlements the registrar cannot before the decree absolute conduct the preliminary investigations which are necessary to put the matter in train to be dealt with by the judge. No order can be made before the decree absolute; but upon a petition to vary the registrar has no power, such as he has in cases of maintenance and alimony, to make an order. The inquiry mentioned in s. 5 of the Act of 1859 means an inquiry by the judge as distinguished from the preliminary

(1) [1904] P. 306.

C. A. 1911

CLARKE v. CLARKE AND LINDSAY.

investigation before the registrar. The judge fixed June 12 as the date for answering the petition in order to give time to the registrar to make his report so that the matter might be dealt with by the Court immediately after the decree absolute. It is a material consideration that at the time when the Act of 1859 was passed there was only one decree, and that was the final decree. The decree nisi was introduced for the first time by the Matrimonial Causes Act, 1860, and the interval between the decree nisi and the decree absolute was extended by the Matrimonial Causes Act, 1866, from three months to six months. In the meantime the Divorce Rules and Regulations were passed. Rules 98, 101, and 102 support the respondent's contention that it is competent to the registrar, to whom the petition is sent as a matter of course, to conduct the preliminary investigation. The appellant must go the length of saying that a petition for variation of settlements cannot be filed before decree absolute, but that is contrary to *Constantinidi* v. *Constantinidi* (1), and she has herself recognized that the petition is properly on the file by applying for an extension of the time for answering it. If that contention were to prevail it would involve a delay of one, two, or three months after the decree absolute before an order could be made and would in many cases inflict a serious hardship on the petitioner, since the order takes effect only from the date when it is made, not from the date of the decree absolute.

COZENS-HARDY M.R. I think that this appeal must be allowed. It appears to me a reasonably plain case. A peculiar jurisdiction was given by the Matrimonial Causes Act, 1859, to vary settlements. That section is extremely precise. [The Master of the Rolls read the section.] The jurisdiction of the Court is in terms limited to after the final decree. The argument is that the registrar, who is an officer of the Court, can do that which the Court itself cannot do. It is said that although Bargrave Deane J. could not make an order on the petition the registrar could make an inquiry and could make his report, and that that could be brought to the judge for him to make an order upon it,

(1) [1904] P. 306.

notwithstanding that the section limits the jurisdiction to after the decree absolute. That is contrary to the wording of the section. But then it is said that *Constantinidi* v. *Constantinidi* (1) decided that that could be done. In my opinion it decided nothing of the sort. What we said there was that no assignment after the filing of the petition would avail to prevent the Court from exercising its jurisdiction. The doctrine of lis pendens would apply. The Court said further that although the decree had not been made absolute there was no harm in allowing the petition to remain on the file. It is always difficult to secure that a petition, which operates as a lis pendens, should be put on the file the instant that the decree is made absolute, so we said in that case "Leave this petition on the file and the Court will take notice of it at the right time, that is, when the decree is made absolute." That was all that we decided in that case. We did not decide and we had no jurisdiction to decide anything more. I can see no jurisdiction whatever to take any proceedings to rescind or vary the settlement until after the decree is made absolute. The petition is simply allowed to remain on the file to take effect the moment the decree is made absolute. The idea of allowing proceedings to be taken when it is uncertain whether the decree absolute will ever be made is to my mind little short of absurd.

BUCKLEY L.J. At a time which has not arrived and may never arrive and in an event which has not happened and may never happen there will be a jurisdiction in the Divorce Court to vary this settlement upon a petition being presented for that purpose. The husband has petitioned at a time when the Court has no jurisdiction in the matter. The question is whether the wife is now compellable to answer that petition. There are rules as to the time for answering petitions, but this is not a petition at all. The petition is no more an effective legal process than it would have been if presented in the Chancery Division or in the Bankruptcy Court. The present order is that the wife shall answer the petition within a certain time. In my opinion there was no jurisdiction in the Court to make any such order or any order at all upon the wife. What the wife asks here is,

(1) [1904] P. 306.

C. A. 1911

CLARKE v. CLARKE AND LINDSAY.

Buckley L.J.

not to take the petition off the file, but, as in *Constantinidi* v. *Constantinidi* (1), to allow the petition to remain on the file on the terms that no proceedings shall be taken upon it until after the decree absolute, and she offers by her counsel to put in an answer within a month after the decree has been made. As she makes that offer so be it. Had we been asked to make an order to that effect, I should have declined. In my opinion the appeal should be allowed.

KENNEDY L.J. I entirely agree. If I were asked, after consideration of the Act and the Rules and Regulations, I should say there is no power whatever to file a petition until after the decree is made absolute. Inquiry seems to me to involve all that may have to be done by the Court either by itself or through its officers. But assuming for the moment that we may treat this petition as having been filed, the best that can happen to the petitioner is that the petition may be allowed to remain on the file, which may have some value in enabling it to be treated as a lis pendens at the earliest moment after the decree is made absolute so as to prevent any possible hardship on the petitioner. The statute is clear that the Court has no jurisdiction in the matter until after the decree absolute, and it is useless to consider the Rules, which in my opinion do not confer any jurisdiction but merely provide the machinery to be set in motion at the time when the jurisdiction becomes effective.

Appeal allowed.

Solicitors for appellant: *Bird & Bird.*
Solicitor for respondent: *Alfred Jonas.*

(1) [1904] P. 306.

H. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1911
May 8;
July 3, 14.

STEVENSON *v.* STEVENSON.

Divorce—Petition—Judicial Separation—Statutory Period of Desertion—Effect of Proceedings for Judicial Separation—Supplemental Petition—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 27.

The filing and prosecution of a suit for judicial separation precludes the petitioner from successfully pleading that the period of desertion was running during the time the suit was being maintained.

Lapington v. *Lapington* (1888) 14 P. D. 21, and *Kay* v. *Kay* [1904] P. 382, approved.

Appeal from a decision of Bargrave Deane J. which raised the question whether the filing and prosecution of a suit for judicial separation precluded the petitioner, the wife, from successfully pleading that the statutory period of desertion was running during the time the suit was pending.

On July 12, 1910, a wife presented a petition for judicial separation on the ground of her husband's adultery.

On January 30, 1911, the petitioner filed a supplemental petition alleging that on December 12, 1908, her husband had without cause wilfully deserted her and had since that date neglected to provide for and maintain her, and had never since returned to cohabitation with her, and that he was still living in adultery. The petitioner therefore claimed a dissolution of her marriage on the ground of her husband's adultery and desertion.

At the trial of the petition on May 8, 1911, the adultery was proved, and also the fact of the desertion on December 12, 1908.

Frank Dodd, for the petitioner, declined to take an order for judicial separation and contended that the wife was entitled to a decree nisi, and cited most of the cases referred to in the argument before the Court of Appeal.

The respondent, the husband, did not appear.

Bargrave Deane J. In my opinion this petition must be dismissed.

The Matrimonial Causes Act, 1857, s. 27, is clear. Desertion

1911

STEVENSON v. STEVENSON.

Bargrave Deane J.

coupled with adultery is a ground for divorce if the desertion shall be without excuse for two years. This lady filed a petition asking for a decree of judicial separation after the desertion had lasted eighteen months, and she prayed for a judicial separation on the ground of adultery. That is the strongest piece of evidence you can have that she herself wished the state of cohabitation to be put an end to; and from that moment, as long as that prayer was on the record there would be no desertion, because it was with her consent that the husband was away, and she was asking and praying the Court to insist on his keeping away. When she found she had made a mistake and that she would like to get a decree of divorce she presents a supplemental petition at the end of the two years—six months after the other one—in which she prays for divorce on the ground of adultery as alleged in the first petition, coupled with desertion as alleged in the supplemental petition. It is manifest she cannot put before the Court desertion for two years, which is what the Act of Parliament requires. In my opinion, long before the two years was up she was only too anxious that there should be a decree of judicial separation, and that does away with the whole principle of the question of relief for desertion. The petition must be dismissed. The petitioner can of course file a fresh petition later on if the desertion is continued.

The petitioner appealed. The appeal was heard on July 3, 1911.

Frank Dodd, for the appellant. The statutory period of two years was complete at the date of the presentation of the supplemental petition, and the petitioner was therefore entitled to a decree on the ground of adultery coupled with two years' desertion.

In *Kettlewell* v. *Kettlewell* (1) the two years requisite to constitute legal desertion were not completed at the filing of the petition, and an application at the hearing for leave to amend by adding a paragraph alleging desertion for two years was granted. In *Knapp* v. *Knapp* (2) the wife's petition was allowed to be

(1) (1880) 41 L. T. 737. (2) (1880) 6 P. D. 10.

withdrawn, and a second petition was filed alleging desertion for two years, which had not accrued at the date of the first petition; and in *Wood* v. *Wood* (1), the evidence of desertion being some months short of two years, a supplemental petition charging desertion was filed, on which a decree nisi was granted. All these cases were considered in *Kay* v. *Kay* (2), in which there is nothing to shew that the President differed from the decisions in *Knapp* v. *Knapp* (3) and *Wood* v. *Wood* (1); it appears from the head-note that the question of the effect of a petition for judicial separation is left open.

Lapington v. *Lapington* (4) is an authority directly adverse to the appellant, but the observations of Buckley L.J. in *Harriman* v. *Harriman* (5) shew that the existence of a non-cohabitation order, equivalent to a petition for judicial separation, does not preclude the possibility of proving desertion after its date. There is evidence here that the husband did not intend to return.

[FARWELL L.J. The other members of the Court in *Harriman* v. *Harriman* (5) do not say anything of the kind: the decision of the Court was that the non-cohabitation order did prevent the continuance of the desertion after the date of the order. Sect. 27 of the Matrimonial Causes Act, 1857, provides a new ground for dissolution, namely, "desertion without reasonable excuse for two years." This ground must exist at the date of the petition.]

The difficulty is met by an amendment or, as here, by a supplemental petition, which brings before the Court matters that have happened since the date of the original petition: *Borham* v. *Borham* (6); *Webb* v. *Webb.* (7)

[FARWELL L.J. referred to *Boddy* v. *Boddy.* (8)]

Desertion is a question of fact and the period may continue to run notwithstanding a petition for judicial separation; the supplemental petition cures the defect which existed in this respect when the first petition was filed.

The respondent did not appear.

Cur. adv. vult.

(1) (1887) 13 P. D. 22.
(2) [1904] P. 382.
(3) 6 P. D. 10.
(4) 14 P. D. 21.
(5) [1909] P. 123, 148.
(6) (1870) L. R. 2 P. & M. 193.
(7) (1828) 1 Hagg. Eccl. 349.
(8) (1860) 30 L. J. (P. M. & A.) 23.

C. A. 1911

STEVENSON v. STEVENSON.

July 14. COZENS-HARDY M.R. On July 12, 1910, Mrs. Stevenson presented a petition for judicial separation on the ground of her husband's adultery, no other matrimonial offence being alleged. On January 30, 1911, Mrs. Stevenson presented what is called a supplemental petition alleging that her husband had on December 12, 1908, without lawful cause wilfully deserted her, and had since that date neglected to provide for or maintain her, and had never since returned to cohabitation with her, and that he was still living in adultery, and the petition prayed for a dissolution of marriage. The husband did not appear or defend the suit. At the hearing before Bargrave Deane J. the adultery was proved, and also the fact of desertion on December 12, 1908. The learned judge dismissed the petition, the petitioner having declined to take an order for judicial separation. In my opinion this decision was perfectly right. At the date of the petition there had not been desertion for two years, such as is required by the statute. The desertion had lasted eighteen months only. The presentation of the petition and its continuance on the files of the Court prevented the subsequent desertion from being without excuse. She was praying the Court to require her husband to keep away. When the supplemental petition was filed there had not been desertion for two years without excuse. Bargrave Deane J.'s judgment seems to me to be in strict accordance with the very careful judgment of Gorell Barnes J. in *Kay* v. *Kay* (1) and with the judgment of the Full Court of Appeal in *Harriman* v. *Harriman*. (2) Butt J.'s decision in *Lapington* v. *Lapington* (3) is also a direct authority against the petitioner.

In my opinion the appeal fails and must be dismissed.

FARWELL L.J. I agree.

KENNEDY L.J. I agree.

Appeal dismissed.

Solicitors: *Hammond & Beningfield.*

(1) [1904] P. 382. (2) [1909] P. 123.
(3) 14 P. D. 21.

W. C. D.

[DIVISIONAL COURT.]

1911
July 7, 18.

STOKES *v.* STOKES.

Divorce—Practice—Desertion—Appeal from Justices—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39)—*Second Summons for same Cause of Complaint—Res Judicata.*

A wife, whose summons, under the Summary Jurisdiction (Married Women) Act, 1895, has been heard and dismissed, cannot obtain an order on a second summons founded on the same cause of complaint. The matter is res judicata; and this is so, notwithstanding that desertion is a continuing offence.

This was an appeal from the justices of the county borough of Derby against an order under the Summary Jurisdiction (Married Women) Act, 1895, made on April 10, 1911, whereby the husband (appellant) was found guilty of desertion, and was ordered to pay 15*s.* per week maintenance and 8*l.* 17*s.* costs.

The facts, so far as they are material, were as follows:—

The parties were secretly married on June 14, 1886, and after the marriage they lived with their respective parents till the year 1888, when the marriage came to the knowledge of the husband's father, and as a consequence the parties went to live together.

The parties resided at various places down to the year 1890, when the wife's father provided certain money for the purchase of a soda water business in Leicester, at which town the parties lived together down to November 8, 1897, this being the date when the desertion in question is alleged to have commenced.

The wife thereafter commenced proceedings for an injunction and the appointment of a receiver in respect of the said business, and on December 3, 1897, a receiver was appointed.

On December 10, 1897, the business was sold to the wife.

The husband set up in business in Leicester under the name of Stokes & Co., and in 1901 the wife bought the stock of the business of Stokes & Co.

On January 2, 1911, the wife issued a summons against her husband under the Summary Jurisdiction (Married Women) Act, 1895, for alleged desertion, and that summons was heard by a

1911

STOKES v. STOKES.

bench of magistrates at Derby, and was dismissed, on January 9, 1911.

On April 5, 1911, a second summons was issued, also on the ground of alleged desertion.

This came before a differently constituted bench of magistrates at Derby, who found the cause of complaint proved, and ordered the husband to pay 15*s.* a week for maintenance and 8*l.* 17*s.* for costs.

Objection was taken on the ground that the matter was res judicata, but the magistrates overruled the objection.

Barnard, K.C. (*H. Maddocks* with him), for the appellant. The subject-matter of the second summons of April 5, 1911, is clearly res judicata. [*Midland Ry. Co.* v. *Martin & Co.* (1) and *Attorney-General for Trinidad and Tobago* v. *Eriché and Others* (2) were cited, and *Reg.* v. *Gaunt and Another* (3) was also referred to.]

Tinsley Lindley, for the respondent. The further evidence on the second summons of April 5, 1911, was that the husband had admitted to several persons that he was not going to live with his wife again, and several witnesses were called to prove this; whereas, at the first hearing, the wife was the only witness.

It was entirely the act of the husband which brought the marital relations to an end.

If the same witnesses had been called at the hearing of the second summons as upon that of the first the matter would be res judicata.

The present case falls entirely within the case of *Fletcher* v. *Fletcher*. (4)

There can be more than one summons for desertion, as for wilful neglect. (5)

Barnard, K.C., in reply. The case of *Fletcher* v. *Fletcher* (4) is no authority in the present case. In that case there were fresh facts, and, therefore, there was a new cause of complaint.

(1 [1893] 2 Q. B. 172, Wright J., at p. 174.
(2) [1893] A. C. 518, at p. 523.
(3) (1867) L. R. 2 Q. B. 466.
(4) (1900) 64 J. P. 807.
(5) *Pickavance* v. *Pickavance* [1901] P. 60.

[He cited *Finney* v. *Finney* (1), *Reg.* v. *Glynne and Others* (2), and *Johnson* v. *Johnson.* (3)]

Cur. adv. vult.

SIR SAMUEL EVANS, PRESIDENT, delivered the judgment of the Court (Sir Samuel Evans, President, and Bargrave Deane J.).

In this case the wife (respondent in the appeal) caused a summons to be issued against her husband (appellant in the appeal), on January 2, 1911, to appear before the justices to answer a charge of desertion, and to shew cause why an order should not be made against him under the Summary Jurisdiction (Married Women) Act, 1895. (4)

The cause of complaint was that the husband deserted the wife on November 8, 1897, and that he had been guilty of desertion ever since. The justices heard the case fully on both sides. They dismissed the summons on the ground that the desertion was not proved.

On April 5, 1911, the wife caused another summons to be issued, in identical words with the first summons. The cause of complaint was also the same. Upon the hearing of this summons, objection was made by the husband that the justices had no jurisdiction to hear the case, as the matter was res judicata. The justices nevertheless proceeded to hear it, and made an order against the husband.

He now appeals both on the question of jurisdiction, and on the facts.

The preliminary question of law is, whether a wife is entitled to have a second summons issued and heard for the same cause of complaint under the Summary Jurisdiction (Married Women) Act, 1895 (4), where, upon a former summons, the case had been heard, and the summons dismissed.

The point is one of importance and has not hitherto been decided.

The analogy of the right of a mother to make repeated applications (within the limited time) for an order in bastardy was relied upon. The reason, however, for this right is that no

(1) (1868) L. R. 1 P. & M. 483.
(2) (1871) L. R. 7 Q. B. 16.
(3) [1900] P. 19.
(4) 58 & 59 Vict. c. 39.

1911

STOKES v. STOKES.

appeal is given by the Bastardy Acts to a mother against an adverse decision by the justices. (1) If an appeal has been brought by the putative father to quarter sessions, and the appeal has been heard and decided against the mother, no fresh summons can be issued by her. (2)

By the Summary Jurisdiction (Married Women) Act, 1895 (3), a right of appeal is given to either party. The analogy of the bastardy cases accordingly fails.

The question therefore depends upon general principles applicable to the doctrine of res judicata, or of estoppel.

The case of *Fletcher* v. *Fletcher* (4) was referred to by the respondent's counsel. The case is imperfectly reported. In the course of the argument the President (Sir F. Jeune) appears to have said, "Where there is no date specified, and the words of the summons are general, it does not follow, because the summons is dismissed, the matter is res judicata." The question is not referred to in the judgment, and the case affords no assistance. It certainly is not an authority in the wife's favour. It is to be noted that in the same month (December, 1900) the same two learned judges who dealt with *Fletcher* v. *Fletcher* (4) delivered the considered judgment in *Pickavance* v. *Pickavance* (5), and expressed a decided opinion that a withdrawal of a summons under the Summary Jurisdiction (Married Women) Act, 1895 (6), with the consent of the parties, amounted to a complete withdrawal of the complaint, and that a second summons founded upon the same complaint could not be issued. That opinion was not necessary for the decision of that case, and therefore is only an obiter dictum; and it has been criticized. But there it is. We cannot think that the learned judges who expressed that opinion decided *Fletcher* v. *Fletcher* (4) in the sense contended for by the respondent's counsel.

It was said, in the case now before the Court, that the wife produced evidence at the second hearing which she did not, and could not, produce at the first hearing. That is not the test.

(1) *Reg.* v. *Machen and Brickdale*, (1849) 14 Q. B. 74; *The Queen* v. *Gaunt and Another*, (1867) L. R. 2 Q. B. 466.

(2) *The Queen* v. *Glynne and Others*, L. R. 7 Q. B. 16.

(3) 58 & 59 Vict. c. 39, s. 2.

(4) 64 J. P. 807.

(5) [1901] P. 60.

(6) 58 & 59 Vict. c. 39.

1911

STOKES v. STOKES.

The right test is whether, if the evidence on the second hearing had been given on the first hearing, the order could have been made; or, in other words, whether the matter in issue between the parties upon the second complaint was heard and determined on the first hearing upon the evidence then adduced. The answer, in whichever form the test is applied, is clearly in the affirmative.

In this particular case the wife on the second hearing said in terms, "No additional facts can be proved to-day but what could have been proved on January 9 if the witnesses had been here." But we do not want the decision to rest upon this. It rests on broader grounds.

If a wife makes a complaint of desertion, places her case before the justices, adduces the evidence on which she relies, and asks for their decision, and they decide against her, she cannot afterwards, whatever further evidence she may obtain, issue another summons for the same cause of complaint. The fact that desertion is a continuing offence makes no difference; because the desertion must be referable to some particular time when it began. Indeed in such a case the hardship upon a husband, if repeated charges were made against him for the same alleged offence, would be very great, as there is no limit of time for complaints in the case of desertion, which is a continuing offence. (1)

In this very case the first summons was not issued until more than thirteen years after the alleged desertion.

It might be urged that a wife might suffer hardship if her case was insufficiently presented or supported, through ignorance or want of available evidence, and was therefore dismissed. The answer is that she should ask the justices for an adjournment, in order that she might bring and properly present all the evidence she had to substantiate the charge she had made.

In all proper cases, the justices ought to, and would, grant an adjournment for that purpose.

It is clear that, if a petition for a judicial separation on the ground of desertion were filed in this Division of the High Court, and dismissed after a hearing, a second petition could not be

(1) *Heard* v. *Heard* [1896] P. 188.

1911

STOKES v. STOKES.

brought upon the same alleged desertion, either by itself, or coupled with a charge of another matrimonial offence, e.g. adultery. (1)

It is important that complaints under the Summary Jurisdiction (Married Women) Act, 1895 (2), made before justices should be tried in accordance with the principles and practice which are acted upon by this Court in cases involving similar charges.

We are of opinion that the justices had no jurisdiction to hear the second summons in this case, or to make the order appealed from. The appeal is therefore allowed. The respondent must bear her own costs.

Appeal allowed.

Solicitors for appellant (husband): *Hamlins, Grammer & Hamlins, Agents for Bendle W. Moore, Derby.*

Solicitors for respondent (wife): *Indermaur & Brown, Agents for Clifford & Cliffords, Derby.*

(1) *Finney* v. *Finney*, L. R. 1 P. & M. 483. (2) 58 & 59 Vict. c. 39.

H. D. G.

PRICE *v.* PRICE AND BROWN.

1911
July 19.

Divorce—Adultery—Condonation—Non-compliance with subsequent Decree for Restitution of Conjugal Rights—Statutory Desertion—Matrimonial Causes Act, 1884 (47 & 48 *Vict. c.* 68), *s.* 5—*Matrimonial Offence—Revival of Condoned Adultery—Decree Nisi.*

The matrimonial offence of desertion created by reason of non-compliance with a decree for restitution of conjugal rights revives condoned adultery.

This was the petition of the husband for the dissolution of his marriage.

The material facts were as follows:—

The marriage was in 1898, and it resulted in the birth of two children.

In 1908 the wife committed adultery with the co-respondent, but this was condoned by the petitioner.

On April 1, 1910, the husband commenced a suit for restitution of conjugal rights, and on November 7, 1910, a decree was granted.

On January 24, 1911, a certified copy of the decree was duly served upon the respondent, who disobeyed the same.

On February 17, 1911, the present petition was presented by the husband.

No defence was offered.

Barnard, K.C., and *Le Bas*, for the petitioner. The husband is entitled to a decree dissolving his marriage. Any matrimonial offence revives condoned adultery. The wife has been undoubtedly guilty of a matrimonial offence in refusing or neglecting to obey the decree for restitution of conjugal rights. [They relied on *Paine* v. *Paine* (1) and also referred to *Copsey* v. *Copsey and Erney* (2) and *Houghton* v. *Houghton*. (3)]

[Sir Samuel Evans, President. In *Collins* v. *Collins* (4) Lord Blackburn throws doubt on *Dent* v. *Dent* (5), where cruelty had been held to revive condoned adultery.]

W. O. Willis, for the respondent, did not oppose the petition.

(1) [1903] P. 263.
(2) [1905] P. 94.
(3) [1903] P. 150.
(4) (1884) 9 App. Cas. 205, at p. 240.
(5) (1865) 34 L. J. (P. & M.) 118.

1911

PRICE v. PRICE AND BROWN.

SIR SAMUEL EVANS, PRESIDENT. In this case, having heard the evidence, I find that adultery in 1908 is proved, and that it was afterwards condoned. I am also satisfied that the decree, made on November 7, 1910, for restitution of conjugal rights has been disobeyed.

The question is whether the consequent statutory desertion revives the condoned adultery.

This is the first case of the kind, so far as I can find.

Paine v. *Paine* (1) was a converse case, and there the statutory desertion was held to be revived by uncondoned adultery.

In *Houghton* v. *Houghton* (2) desertion for two years and upwards was held to revive condoned adultery. That was desertion of the wife by the husband; and Sir Gorell Barnes, following that decision in *Copsey* v. *Copsey and Erney* (3), applied the same doctrine as had been held to apply where the desertion had been by the wife.

Here, there has been statutory desertion under s. 5 of the Matrimonial Causes Act, 1884. (4)

This undoubtedly creates a matrimonial offence, because, under that section, either party has a right to apply for a decree of judicial separation, on the ground of non-compliance with a decree for restitution of conjugal rights.

This must have the same effect in reviving adultery already condoned as the two years' desertion was decided to have in *Houghton* v. *Houghton*. (2)

I therefore pronounce a decree nisi for dissolution of the marriage, with costs, and I make an order for the petitioner to have the custody of the children of the marriage.

Solicitors for petitioner: *Clowes, Hickley & Steward.*

Solicitors for respondent: *Ashurst, Morris, Crisp & Co.*

(1) [1903] P. 263.
(2) [1903] P. 150.
(3) [1905] P. 94.
(4) 47 & 48 Vict. c. 68, s. 5.

H. D. G.

LESLIE *v.* LESLIE.

1911

March 13; *July* 10.

Divorce—Practice—Judicial Separation—Alimentary Provision for Wife—Misconduct of the Petitioner other than of a Matrimonial Nature—All the Circumstances to be considered in each Case.

The general conduct of a wife, who has proved her husband guilty of a matrimonial offence and obtained a decree against him, must be looked at and considered when the Court is asked by her to order permanent alimony; just as it ought to be considered upon an application for alimony pending suit.

The petitioner is not, merely by reason of having proved her husband guilty of a matrimonial offence and being herself innocent of any matrimonial offence, entitled as against her husband to any particular proportion of his income; though, if she has no means whatever, even though her conduct before and after matrimony has been reprehensible, the husband is bound to allow her a sum which will enable her to live a respectable life.

This was a summons heard in Court as in chambers.

After argument, judgment was reserved and was subsequently delivered in chambers.

The material facts and points raised in the course of the arguments appear sufficiently in the considered judgment.

Barnard, K.C. (*Stuart Bevan* with him), for the petitioner.

George Wallace, K.C. (*A. S. Carr* with him), for the respondent.

Sir Samuel Evans, President. This is an appeal from an order of the registrar made upon the application of the petitioner for permanent alimony. In form the application was to strike out certain paragraphs of the respondent's affidavit, and for a declaration that the petitioner was not entitled to alimony from the respondent. In substance, the question is whether upon the facts the petitioner was disentitled to any allowance by way of permanent alimony following upon a decree which the petitioner had obtained for a judicial separation from the respondent.

The petitioner is the wife, and the respondent is the husband. On February 4, 1907, upon the petition of the wife, a decree for restitution of conjugal rights was made against the husband. The husband failed to obey this decree, and thus became guilty of statutory desertion. Thereupon the wife presented a petition

1911

LESLIE v. LESLIE.

The President.

for judicial separation. Upon her petition a decree of judicial separation was pronounced on June 10, 1907.

The wife has no means.

The husband has an income of about 1500*l.* per annum. Prima facie, therefore, the wife is entitled to permanent alimony. The husband in answer says that she was guilty of frauds before the marriage, which greatly disappointed his expectations, and after the marriage, which entailed upon him heavy losses. The wife was convicted of certain frauds before the marriage, as set out in the affidavit before referred to; and was also convicted of fraud subsequent to the marriage, as appears from the facts stated in the report of *Leslie* v. *Leslie*. (1)

The question in these circumstances is not as to the amount of permanent alimony to which she may be entitled, but as to whether I can say, without inquiry being held, that she is not entitled to any alimony at all. The decision in *Leslie* v. *Leslie* (1) was that while the petitioner was in prison under the conviction for fraud she was not entitled to have an inquiry as to permanent alimony. Bargrave Deane J. said (2): "I see that a time may come when it will be necessary that this inquiry should be held; and I think the best order I can make now is that the application for permanent alimony should stand over until, say, two months before the time comes when the petitioner will be released from prison. An inquiry can then be held, and an order can be made to take effect from the time when she comes out of prison." That was not a decision which disposes of this application, for the point now to be determined was not then raised. The principles upon which alimony is given in suits for judicial separation are to be conformable to those which prevailed in the Ecclesiastical Courts. (3) In Godolphin's Abridgment of Ecclesiastical Law, p. 508, alimony is defined as follows: "Alimony, although it properly signifies nourishment or maintenance, when strictly taken; yet now in the common, legal, and practicable sense, it signifies that proportion of the husband's estate, which the wife sues in the Ecclesiastical Court, to have allowed her for her present subsistence and livelihood according to law, upon

(1) [1908] P. 99 et seq.

(2) [1908] P. 99, at p. 108.

(3) The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 22.

any such separation from her husband, as is not caused by her own elopement, or adultery": and "elopement" is there explained as meaning "that voluntary departure of a wife from her husband to live with an adulterer, and with whom she does live in breach of the matrimonial vow, whereby she incurs the forfeiture of her dower, unless her husband upon her free and voluntary submission shall think fit by way of reconciliation to receive her again, and readmit her into the former conjugal relation."

Ayliffe in his Parergon, p. 58, says: ". . . . Alimony . . . . signifies that legal proportion of the husband's estate, which, by the sentence of the Ecclesiastical Court, is allowed to the wife for her maintenance; upon account of any separation from him; . . . ."

In Poynter on Marriage and Divorce, p. 91, permanent alimony is described as "that legal proportion of the husband's estate, which by sentence of an Ecclesiastical Court is allotted to the wife for her maintenance after a sentence of divorce" [which of course means divorce a mensa et thoro] "by reason of the cruelty or adultery of the husband, as the permanent allowance to be paid by the husband to the wife during the period of their separation."

The origin of the wife's right to alimony was the right which the husband had upon the marriage to all the property of the wife. The legislation of the last generation has deprived the husband of his complete rights to the wife's property; but his obligation to provide for her maintenance, in proportion to his ability so to do, remains upon grounds which are broader and deeper. The amount of the alimony, and indeed in some degree the question of whether or not it should be allowed at all, is of discretion in the Court, a discretion to be exercised judicially according to established principles of law, and upon an equitable view of all the circumstances of the particular case. It has from time to time been argued that in cases of separation where the wife is the party at fault, she cannot be entitled to alimony; but this question has now been set at rest by the decisions in *Prichard* v. *Prichard* (1) and *Goodden* v. *Goodden*. (2)

(1) (1864) 3 Sw. & Tr. 523. (2) [1892] P. 1.

1911

LESLIE v. LESLIE.

The President.

In the case now before this Court, the husband has been most unfortunate in his marriage and in his marital relations. He has greatly suffered from the financial losses which he has incurred by reason of his wife's extravagant and fraudulent conduct. It was argued on his behalf that she procured him to marry her by her fraudulent misrepresentations. If this were so, it would not, of course, in any way affect the validity of the marriage. Indeed the proceedings in which the application now before the Court is made shew and establish the validity of the marriage.

The wife obtained her decree for restitution of conjugal rights. The husband disobeyed this decree. He thereby became guilty of desertion by statute. She thereupon obtained her decree for judicial separation. Although she was afterwards convicted and sentenced to penal servitude, she remains by law his wife, and he is still by law her husband.

The decree for judicial separation makes her a feme sole with regard to contracts, torts, and rights of property; and it relieves him to some extent from liability arising from her contracts or torts; but it does not exonerate him from all liability in respect of necessaries supplied to her if she has no means of subsistence, unless he complies with such order as the Court may make with regard to her alimony. (1) The conduct of the wife may be looked at when the Court is asked to order permanent alimony, just as it may be considered upon an application for alimony pendente lite. (2) The contention for the respondent here is that there ought to be no inquiry as to permanent alimony; or, in other words, that the Court has no jurisdiction to order that she should receive any alimony at all. She has no means whatsoever. If she receives no alimony, she may either have to beg, or to become a burden upon the public, or to be driven to vice, or to starve. It may be, and no doubt is, a hardship upon the husband, but, in so far as matrimonial offences cognizable by the law are concerned, she has proved him to be in the wrong by obtaining the two decrees against him.

In these circumstances I order that the inquiry as to permanent

(1) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 26.

(2) *Brisco* v. *Brisco*, (1816) 2 Hagg. Con. 199, 201.

alimony do proceed; but the order of the registrar must be varied, because the paragraphs of the respondent's affidavit which he ordered to be struck out must stand, as they contain statements of circumstances which cannot be excluded from consideration when the inquiry comes to be held.

The respondent must pay the costs of this appeal.

[Leave to appeal.]

July 10. The matter came up again, after inquiry held before the registrar. It was dealt with in Court as in chambers. The registrar reported and submitted that the petitioner should have 3*l.* per week as a sufficient allowance, under all the circumstances, for her to live upon.

SIR SAMUEL EVANS, PRESIDENT (in chambers), in confirming the submission of the registrar, said that the wife, in the circumstances, was not entitled to any specific proportion, or to the proportion which was usually allowed by the Court. The amount of 3*l.* per week was sufficient for her, and she was not entitled to any greater allowance upon the principles set out in the judgment already pronounced on March 13, 1911, and reported above.

Solicitors for petitioner: *Edgar Smith & Co.*

Solicitors for respondent: *E. F. Turner & Son.*

H. D. G.

C. A.
1911
Feb. 27, 28;
March 1, 2.

[IN THE COURT OF APPEAL.]

THE WEST COCK.

Admiralty—Ship—Towage Contract—Defective Towing Gear—Warranty of Fitness of Tug—Exemptions applying only after Towage began.

Whilst the defendants' tug was towing the plaintiffs' vessel from Birkenhead to the Canada Dock, Liverpool, the towing gear of the tug carried away, with the result that the plaintiffs' vessel fell against the pierhead at the entrance to the dock and sustained damage.

In an action for breach of the contract of towage, the defendants relied on a condition in the contract by which they were "not to be responsible for any damage to the ship they have contracted to tow arising from any perils or accidents of the seas rivers or navigation collision straining or arising from towing gear (including consequence of defect therein or damage thereto) and whether the perils or things above mentioned or the loss or injury therefrom be occasioned by the negligence default or error in judgment of the pilot master officers engineers crew or other servants of the tug owners":—

Held by the Court of Appeal (Vaughan Williams, Farwell, and Kennedy L.JJ.), affirming the decision in the Court below, [1911] P. 23, that the defendants were liable—whether there was a warranty of fitness implied in the contract of towage, as the President in the Court below had found, or whether the duty of the defendant tug owners was restricted to the supply of a tug as reasonably fit for service as care and skill could make it—for the cause of the damage sustained by the plaintiffs' vessel was the defective condition of the rivets attaching the towing gear of the tug to her bunker casing. This defect was not covered by the contract, the conditions of which only applied to circumstances occurring after the commencement of, and during, the towage, and not to the state of things existing before the towage began.

Held, further, by Farwell and Kennedy L.JJ. (Vaughan Williams L.J. dissenting), that the words "towing gear" did not include the rivets, or attachments, between the gear and the bulkhead, and, therefore, the defect which caused the accident was not within the words of the condition.

Appeal by defendants, the Liverpool Screw Towing and Lighterage Company, owners of the tugs *West Cock* and *South Cock*, in an action of damage for breach of a contract of towage, against a decision of Sir Samuel Evans, President, in favour of the respondents (plaintiffs), David MacIver, Sons & Co., Limited, of Liverpool, owners of the steamship *Araby*.

The following is a summary of the facts, and of the pleadings,

which are fully set out in the report of the case in the Court below. (1)

On January 12, 1909, whilst the *Araby*, a steel screw steamship of 3303 tons gross register, was lying in the Morpeth Dock, Birkenhead, with a part cargo of about 700 tons weight, together with about 1700 tons of bunker coal on board, the defendants verbally agreed with the plaintiffs for reward to supply two steam tugs to tow the vessel to the Canada Dock, Liverpool, and to dock her there.

In pursuance of the contract the defendants sent the steam tugs *West Cock* and *South Cock* to the Morpeth Dock. The *West Cock* was made fast to the *Araby* astern by means of two six-inch manilla hawsers each with a scope of about ninety feet. Each of the hawsers was secured to a towing hook on board the *West Cock*, and was thence carried round the bitts on the *Araby*, thence back over the towing hook on the *West Cock*, and finally back to the bitts on the *Araby* and there made fast. The other steam tug, the *South Cock*, was made fast ahead of the *Araby*, and that vessel was then towed towards the Canada Dock; but when the *Araby* had been brought, about 3 P.M., at high water, close alongside the knuckle of the south jetty off the entrance to the Canada Dock, the towing hooks and gear of the *West Cock* carried away, and, in consequence, the *Araby* struck the knuckle of the jetty with her starboard side, and received extensive damage.

By their statement of claim the plaintiffs alleged (inter alia) that by the contract of towage "the defendants impliedly undertook and/or warranted that the steam tugs to be supplied by them would be properly equipped and fit in all respects to undertake and efficiently perform the intended service," and that, in sending the steam tugs *West Cock* and *South Cock* "to perform the intended service, the defendants thereby warranted that each of the tugs was properly equipped and fit in all respects to undertake and efficiently perform the intended services," but "the towing hooks, gear, equipment and structure of the *West Cock*, in breach of the implied undertaking and/or warranties, were unfit" for the intended service, and by their particulars the plaintiffs set out the details of the alleged unfitness.

(1) [1911] P. 23.

C. A. 1911

THE WEST COCK.

Alternatively the plaintiffs alleged that it was an implied term of the contract that the defendants would take reasonable care that the steam tugs to be supplied by them should be properly equipped and fit in all respects to undertake and efficiently perform the intended service, but the defendants failed to take any or reasonable care in that they omitted: (*a*) to make any or any proper and sufficient inspection of the *West Cock's* towing gear, and/or (*b*) to provide the *West Cock* with towing gear properly designed and of sufficient strength.

By their defence and counter-claim the defendants alleged that the verbal agreement to tow the *Araby* was subject to the ordinary conditions of towage on which the defendants supply and have supplied tugs to the plaintiffs and others, namely: "The tug owners are not to be responsible for any damage to the ship they have contracted to tow arising from any perils or accidents of the seas rivers or navigation collision straining or arising from towing gear (including consequence of defect therein or damage thereto) and whether the perils or things above mentioned or the loss or injury therefrom be occasioned by the negligence default or error in judgment of the pilot master officers engineers crew or other servants of the tug owners."

The defendants did not admit that there was implied in the towage contract the undertaking or warranty, or, alternatively, the term mentioned in the statement of claim, and they alleged that "the *West Cock* was reasonably fit in every respect to perform the service and all reasonable care was taken in that behalf but her towing hooks and their foundations were carried away owing to the unusual or excessive strains put upon them during the towage. The strains were unusual and excessive owing to the wind being a west-north-west gale and the sea heavy, the *Araby* being high out of the water with her port side exposed to the full force of the wind and having no steam on the main engines, the scope of tow rope given by the *Araby* being fifteen fathoms and the tug towing at full speed in obedience to orders given by some person on board the *Araby* (believed to be one of the officers) shortly before the towing hooks and their foundations carried away."

The defendants further alleged that if the *West Cock* was unfit or reasonable care was not taken to make her fit (which was denied) the defendants were protected from liability for the alleged damage to the *Araby* by the conditions of towage (set out above), and, alternatively, the defendants said that the damage to the *Araby* was caused or contributed to by the negligence of the plaintiffs or their servants in ordering the tugs to tow the *Araby* in the weather and other conditions mentioned above, the orders referred to being given by some person on board the *Araby* (believed to be in charge of her) shortly before the *West Cock* made fast to her in the Morpeth Dock.

By way of counter-claim the defendants alleged that they had suffered damage amounting to 43*l.* 11*s.* 3*d.* by reason of the carrying away of the tug's towing hooks and their foundations in the circumstances alleged in the defence, and that by the implied terms of the towage contract the plaintiffs agreed to indemnify the defendants in respect of such damage. Alternatively the defendants alleged that this damage was caused by the negligence of the plaintiffs or their servants in ordering the tug to tow the *Araby* in the weather and other conditions mentioned above.

The case was tried in the Court below on October 17, 18, and 19, 1910, with the assistance of two of the Elder Brethren of the Trinity House, and, on October 31, the President (Sir Samuel Evans) delivered a considered judgment, set out in full in the report of the case in the Court below (1), from which the following extracts are taken:—

The substance of the case for the plaintiffs is that, by reason of the inefficiency of the tug *West Cock*, the towing gear of the tug carried away and fell overboard; and that, as the result of this, the *Araby* was driven against the knuckle of the pierhead at the entrance to the Canada Dock, and was damaged.

The distance from the Morpeth Dock to the Canada Dock is about two miles along and across the Mersey. For part of this distance the *West Cock* had been towing ahead of the *Araby*, with the tug *South Cock*. When near the end of the towing voyage, just outside the entrance to the Canada Dock, the *West Cock* came away from ahead, and was made fast to the stern of

(1) [1911] P. 23, at p. 27.

C. A. 1911

THE WEST COCK.

the *Araby*. This was done pursuant to the directions of the dockmaster, in order that the stern of the *Araby* might be pulled to the northward and westward, so that she might be properly headed for the entrance into the Canada Dock.

The *West Cock* was made fast by two sets of ropes . . . . supplied by the *Araby*. Each set consisted of an end and a bight on and round a hook on the *West Cock*. Each set had therefore three lines of six-inch rope. On the tug (the *West Cock*) were two hooks, one called the centre hook and the other the starboard hook. One set of ropes led from the starboard quarter of the steamer and was made fast to the centre hook of the tug, and the other from the port quarter to the starboard hook. These two hooks were placed between an upper plate and a lower table, to which they were connected by vertical pins. The table and plate were both connected with angle bars, which were fastened to an iron bulkhead or casing by means of rivets. The two hooks could move horizontally. There was a contest as to the vertical motion. The angle bar to which the top plate was connected was fastened to the bulkhead by eight rivets. The heads of the rivets were on the other side of the bulkhead, that is, the side of the bunker hold. While the towing was still proceeding, just outside the entrance to the Canada Dock, the top angle bar, the top plate, and the two hooks carried away and were lost overboard. They were never recovered. Of the towing gear, only the lower table and what was below it remained. The cause of the carrying away of the top angle bar, the top plate, and the hooks was the breaking of the eight rivets referred to. They broke on the towing gear side of the bulkhead. Some of the broken rivets projected on that side about one-eighth of an inch from the surface of the bulkhead, and the others were broken flush with the bulkhead. The rivets, apart from the small broken parts, remained in the bulkhead, and the heads were on the bunker side of it. On the day after the accident the towing gear of the tug was temporarily repaired. In effecting these repairs the broken rivets were knocked out from the towing gear side into the bunker on the other side. The broken rivets were never produced after the accident. It is to be regretted that they were not preserved and produced.

There was some correspondence about them, the effect of which in substance was that the defendants said that all the towing gear was lost overboard, and that there was nothing to produce.

It was clear, and beyond question, that the breaking of the rivets was the cause of the carrying away of the towing gear, and was, therefore, the cause of the *Araby* striking against the pier and suffering the damage which was alleged by the plaintiffs. As to the rivets, the plaintiffs alleged that the equipment of the *West Cock* was unfit in that (inter alia) (1.) the attachments of the top plate and the top angle bar by rivets were not strong enough; (2.) undue strains were transmitted to the rivets by reason of the structure of the towing hooks.

In answer to this, the case for the defendants was that all eight rivets were broken together by some great, unusual, and unexpected strain, alleged to be due wholly or partly to the weight of the tow, the wind, the sea, the tide, and the scope of the hawser between tug and tow. If the rivets had been in good condition the evidence on both sides was that they ought to have stood a very heavy steady strain, namely, from ninety to ninety-nine tons. The plaintiffs attacked the design of the tug, and contended that it was faulty and rendered the tug inefficient. They alleged that the two gear hooks were rigid, had no vertical hinge or swivel, or vertical play, and that in consequence great leverage strains were transmitted to the fastenings of the gear. Elaborate calculations of these alleged leverage strains were given.

Upon the evidence I find that the centre hook was a swivel or hinge hook, and that the starboard hook had enough vertical play; and I find, and am also advised by the Elder Brethren, who are assisting me, that the tug was not faulty in design and was not inefficient upon that ground. Upon the other hand, the defendants contended, as I have said, that there was an unusual and excessive strain upon the towing gear and its connections because (1.) the scope of the towing hawser was too short, and (2.) because the wind, sea, and height out of the water of the *Araby* were unusual and unexpected. It was pleaded by the defendants that the scope of the hawser was given and determined by the *Araby*. This was not so. It was determined by

C. A 1911

THE WEST COCK.

the master of the tug. In this latter event the defendants contended that if the tugmaster was wrong in deciding the scope of the hawser they (the defendants) were exempted from liability by the conditions of the contract. Upon the evidence I find, and I am also advised, that there was no unusual or excessive strain, and no strain that might not reasonably be expected, due to the alleged causes, or any of them. The ropes did not part, and there was no buckling or disturbance of the casing.

Without going in further detail into the evidence, I will state the conclusions at which I have arrived as to the cause of the accident. I find that the accident was due to the weakness, fatigue, and defective condition of the eight rivets, and that at the time of the contract, and of the commencement of the towing operations, the tug *West Cock* was inefficient on this ground to perform the towage services which the defendants contracted to perform. I further find upon the evidence—in case these further findings should turn out to be material—that this inefficiency could have been ascertained by reasonable care, skill, and attention on the part of the tug owners; that no proper inspection of the tug was made by them or their servants before the towage contract was entered into; and that the last inspection before the contract was only an ordinary and perfunctory one, and did not extend to an examination of the rivets or fastenings between the towing gear and the bulkhead casing.

The question which has to be determined is, whether the defendants are liable in these circumstances in view of the terms of the contract. The contract for the towage was verbal. Although there was an issue upon the pleadings as to the terms of the contract, there did not remain, after the evidence, any contest upon the matter. The contract was an ordinary contract for towage, subject to the conditions set out in the defence (see above).

Apart from any special terms or conditions, I endeavoured in *The Maréchal Suchet* (1), after a careful examination of the authorities, to state what I thought were the obligations of a tug owner under a towage contract. They were stated as follows: "The owners of the tug must be taken to have contracted that

(1) [1911] P. 1.

the tug should be efficient, and that her crew, tackle, and equipment should be equal to the work to be accomplished in weather and circumstances reasonably to be expected, and that reasonable skill, care, energy and diligence should be exercised in the accomplishment of the work. On the other hand, they did not warrant that the work should be done under all circumstances and at all hazards, and the failure to accomplish it would be excused if it were due to vis major or to accidents not contemplated, and which rendered the doing of the work impossible."

These obligations can, however, be got rid of, or modified, by express and apt terms in the contract, just as the obligations of a shipowner may be got rid of, or modified, in the case of the duty or obligation to provide a seaworthy vessel under a charter-party or a contract of affreightment. The primary obligation of a tug owner under a towage contract may be described as a duty to provide a tug which, at the time of the contract, or at the commencement of the operations of towage under the contract, is efficient to perform the towage services which the tug undertakes to perform in circumstances reasonably to be expected, or as a representation, or an engagement, or a contract, or an implied engagement that the tug is reasonably efficient for that purpose. If my findings of fact in this case are justified, it matters not whether this primary obligation is an absolute one, so as to amount to a warranty of fitness or efficiency, or whether the obligation is satisfied by the tug owner proving that the unfitness or inefficiency was not discoverable or preventable by any care or skill, or by his proving that he was not aware of the unfitness or inefficiency, and that it could not be discovered by an ordinary inspection.

Unless the special conditions in this contract exonerate the defendants, upon my findings the defendants would be liable in any of the above views of their legal obligations; but, lest my findings of fact may not commend themselves to an appellate tribunal, it is necessary for me to state my view more particularly as to what the obligations are, apart from special conditions or exceptions.

In my opinion it is not sufficient for a tug owner, in an action

C. A. 1911

THE WEST COCK.

like the present, to prove that he was not aware of any unfitness or inefficiency, or that it could not be discovered by an ordinary inspection. At the lowest I think his obligation is to prove that the unfitness or inefficiency was not preventable or discoverable by care or skill. But is not the obligation at the outset greater than this? Is it not an obligation which is absolute and which therefore amounts to a warranty? I think it is. It is well established that the obligation under a charterparty or a bill of lading to provide a vessel which is "seaworthy," in the commercial and legal sense, is an absolute one and amounts to a warranty of seaworthiness; and this obligation has been described as "a representation and an engagement—a contract—by the shipowner that the ship . . . . is at the time of its departure reasonably fit for accomplishing the service which the shipowner engages to perform" (per Lord Cairns in *Steel* v. *State Line Steamship Co.* (1)); and as "a duty on the part of the person who furnishes or supplies that ship . . . . unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a 'warranty,' not merely that they should do their best to make the ship fit, but that the ship should really be fit" (per Lord Blackburn (2)).

It is as important that a tug which undertakes to tow a vessel, in some cases for long distances and in varying circumstances with lives and property at risk, should be efficient for the accomplishment of its work, as it is that a cargo-laden ship should be seaworthy, and in this sense fit for the purposes of the services undertaken under a charterparty. The foundation of the obligation is the same in either case, namely, the fitness of the tug or the ship for the purpose of the services to be performed. [The learned President then referred to the cases of *The Undaunted* (3), *Hyman* v. *Nye* (4), *The Minnehaha* (5), *The Ratata* (6), and to Carver on the Carriage of Goods by Sea, 3rd ed., s. 112, at p. 140, note (*a*).]

(1) (1877) 3 App. Cas. 72, at p. 76.
(2) Ibid. at p. 86.
(3) (1886) 11 P. D. 46.
(4) (1881) 6 Q. B. D. 685, at p. 690.
(5) (1861) Lush. 335, at p. 347.
(6) [1898] A. C. 513.

If the matter were, or is, res integra, I see no reason whatever why the same kind of obligation as to efficiency or fitness should not attach to a marine contract of towage as attaches to a marine contract of carriage. But whether the ordinary contract be (as I think it is) a warranty of fitness, or an implied obligation to provide a tug in a fit and efficient condition so far as skill and care can discover its condition, a serious question remains, namely, whether, under the special terms of exemption in the contract in this case, the defendants are relieved from liability. Whatever the exact obligations of the tug owners may be, there are exceptions under which they seek to avoid, restrict, or minimize those obligations, and they must clearly make out that they are protected by these conditions. I think that the canon of construction to be applied is similar to that which has so frequently been applied in "seaworthiness" cases. Many illustrations can be given. [The learned President quoted passages from the cases of *Nelson Line (Liverpool), Ld.* v. *James Nelson & Sons, Ld.* (1), *Elderslie Steamship Co.* v. *Borthwick* (2), *Owners of Cargo on Board S.S. Waikato* v. *New Zealand Shipping Co.* (3), *Rathbone Brothers & Co.* v. *D. MacIver, Sons & Co.* (4), and *Steel* v. *State Line Steamship Co.* (5).]

In the case now before the Court, I think the reasonable construction to place upon the conditions, and the construction which the owners of the *Araby* might reasonably, and would probably, put upon them, is that they apply to circumstances occurring after the commencement of, and during, the towage, and not to the state of things existing before the towage began. It is hardly conceivable that the conditions should be read as meaning "We will be responsible for inefficiency in any part of the tug except in the towing gear, but we will not be responsible for inefficiency in the towing gear itself"—that being one of the most important parts of the tug in respect of the service it has to perform. The words of exception relied upon by the defendants occur in the middle of a clause which appears to deal with matters which happen during the towing voyage. The clause begins with

(1) [1908] A. C. 16, at p. 19.
(2) [1905] A. C. 93, at p. 96.
(3) [1899] 1 Q. B. 56, at p. 58.
(4) [1903] 2 K. B. 378, at p. 384.
(5) 3 App. Cas. 72, at p. 85.

C. A. 1911

THE WEST COCK.

words obviously referring to the towing voyage, and ends with an exemption from the negligence of the tug owners' servants, and the pilot, who, of course, would only come upon the scene in the course of the towing voyage. In corroboration of this construction I may refer, by way of illustration, to an American case decided in the Supreme Court of the United States. [The learned President referred to the case of *The Caledonia* (1) and also to that of *The Carib Prince.* (2)]

The principles and canon of construction adopted and applied in these cases ought also, in my judgment, to be applied in the construction of the towage contract in the present case. For instances where the language was held to be not sufficiently express and unambiguous to exempt the shipowner seeking to rely upon exceptions, see *Owners of Cargo of Maori King* v. *Hughes* (3) and *Owners of Cargo of S.S. Waikato* v. *New Zealand Shipping Co.* (4) If the tug owners in the present case wished to escape their prima facie liability for defects or inefficiency existing before the towage began, they ought to have made that clear by express and unmistakable words, as was done, for example, in *The Cargo ex Laertes* (5) and in *Rathbone Brothers & Co.* v. *D. MacIver, Sons & Co.* (6); although in the latter case the shipowners were held not exempted by reason of subsequent words in the contract.

In my judgment the words used in the conditions in the present case are not sufficiently clear to exempt the tug owners from liability. A reasonable and sufficiently wide meaning is given to them by reading them as referring only to perils, accidents, defects, damage, negligence, default or error in judgment after the work of towing began, and during the performance of the work. I may add, although I do not desire my judgment to rest upon it, that the defendants could not complain if a strict meaning were given to the words "towing gear" in the conditions by holding that they describe merely the actual towing gear itself, and not the rivets or attachments between the gear and the bulkhead. This is the meaning the defendants themselves have

(1) (1895) 157 U. S. 124, at p. 138.
(2) (1898) 170 U. S. 655, at p. 659.
(3) [1895] 2 Q. B. 550.
(4) [1899] 1 Q. B. 56.
(5) (1887) 12 P. D. 187.
(6) [1903] 2 K. B. 378.

given to the words. They persisted in the correspondence that "all the towing gear" was lost overboard. The rivets were not so lost. The defendants knew they had remained in the bulkhead casing. If this be the right meaning, the defect, which caused the accident, is not within the words of the conditions at all.

As to the counter-claim, it is based upon an alleged agreement by the plaintiffs to indemnify the defendants against any damages. No such agreement was established. Indeed, no evidence at all was given to support the counter-claim, either in law or in fact.

Judgment will accordingly be entered for the plaintiffs on the claim and counter-claim, with costs, and there will be the usual reference on the claim.

On appeal :—

1911. Feb. 27, 28; March 1, 2. *Aspinall, K.C.*, and *C. Robertson Dunlop*, for the appellants (defendants), the Liverpool Screw Towing and Lighterage Company, owners of the tugs *West Cock* and *South Cock*.

Leslie Scott, K.C., and *A. T. Miller*, for the respondents (plaintiffs), David MacIver, Sons & Co., Limited, owners of the steamship *Araby*.

The arguments of counsel sufficiently appear from the judgments. Shortly stated, counsel for the appellants, in contending that the defendant tug owners were not liable for the damage to the *Araby*, submitted: (1.) that the cases indicating an absolute warranty as a carrier were not relevant to the present inquiry, there being no absolute warranty in respect of the fitness of the tug; (2.) that reasonable care to secure fitness was the test, and, assuming that the burden of proof lay upon the appellant tug owners, the evidence shewed that there had been an inspection of the tug such as careful owners are in the habit of making; (3.) that the attack made by the plaintiff shipowners upon the fitness of the tug was negatived by the learned President, who had been advised by the Elder Brethren assisting him, that the tug was not faulty in design, and was not inefficient upon that ground; (4.) that the rivets and attachments were part of the towing gear, and, therefore, the case was covered by

C. A. 1911

THE WEST COCK.

the exception in the contract, as the words "defect therein" might reasonably be construed to refer to defects existing at the commencement of the towage, whilst the words "damage thereto" would refer to injury sustained during the towage; (5.) that a sudden sheer may damage the hook attachments without breaking the rope; (6.) that the accident could readily be accounted for by the abnormal strain due to a gale of wind blowing at the time, and to the vessel being flying light with a scope of only fifteen fathoms of hawser out.

Counsel for the respondent shipowners argued: (1.) that there is, as laid down by the President, an absolute warranty of fitness in the case of the employment of a tug, though, for present purposes, it was sufficient to rely on an implied obligation to use reasonable care and skill to provide a tug in a fit and efficient condition, and that, in this case, the President had found negligence in fact, as, if a proper test had been applied to the rivets, the fatigue would have been detected; (2.) that the weather conditions were not abnormal; (3.) that the ropes not breaking indicated that the attachments of the towing gear were defective; (4.) that the exception in the contract applied only to defects after the work of towing began; (5.) that the words "towing gear" did not include the rivets.

In addition to the cases cited in the judgments, the following were referred to. By counsel for the appellant tug owners: *The Undaunted* (1), and *Readhead* v. *Midland Ry. Co.* (2) By counsel for the respondent shipowners: *Kopitoff* v. *Wilson* (3); *Liver Alkali Co.* v. *Johnson* (4); *Stanton* v. *Richardson* (5); *Nugent* v. *Smith* (6); *The Moorcock* (7); *Elderslie Steamship Co.* v. *Borthwick* (8); *Brass* v. *Maitland* (9); *The United Service* (10).

VAUGHAN WILLIAMS L.J. I may as well say at once that I think this appeal fails, and that the judgment of the President should be supported, but, before stating the main ground upon which I propose to base my judgment, I wish to say that I have

(1) (1886) 11 P. D. 46.
(2) (1869) L. R. 4 Q. B. 379.
(3) (1876) 1 Q. B. D. 377.
(4) (1874) L. R. 9 Ex. 338.
(5) (1874) L. R. 9 C. P. 390.
(6) (1876) 1 C. P. D. 423.
(7) (1889) 14 P. D. 64.
(8) [1905] A. C. 93.
(9) (1856) 6 E. & B. 470.
(10) (1883) 8 P. D. 56.

approached this case with more than usual anxiety, because I think that the President both in the case of *The Maréchal Suchet* (1) and in this case, if I may venture to say so, has laid down in a clear and forcible way what are the duties and liabilities of a tug owner to those who employ him.

With regard to the principle of construction or onus laid down in many cases, including *Rathbone Brothers & Co.* v. *D. MacIver, Sons & Co.* (2), which was a case in this Court, and in which Stirling L.J. gave a very clear judgment to the effect that if there is a common law liability, the shipowner or tug owner—and I make no difference between them for this purpose—can only relieve himself of such liability by shewing, by plain and unambiguous words, that the intention of the contracting parties was to relieve him from such liability, I wish to say that I do not feel inclined at present to affirm the proposition that that rule of construction applies to anything beyond common law liabilities—the common law absolute warranties—those warranties which are absolute in the sense that the party complaining of a breach by the ship or the tug is not obliged to give any evidence of negligence. He has only to shew that there was a warranty and that it has not been complied with,—that the ship was unseaworthy, or that the ship was unseaworthy in the sense that it was unfit to receive the cargo which was to be put into it, but he has not to prove negligence. I think the cases which have been cited are not strong enough to justify me on this occasion in doing more than saying that, as at present advised, I do not see that the cases, or any case cited, have carried that rule of construction further than its application to a case where the words are said to relieve the shipowner or tug owner from the common law liability.

Upon the construction of the contract in this case I think it will be convenient now to say that I am not, as at present advised, disposed to decide the case upon the basis that we should read the words "towing gear" as not including the attachments. In my opinion the hooks and the upper and lower plates connected with the angle bars and fastened to the iron bulkhead by means of rivets were essential to the working of the towing

(1) [1911] P. 1. (2) [1903] 2 K. B. 378.

C. A. 1911

THE WEST COCK.

Vaughan Williams L.J.

gear, and are covered by the words "towing gear," within the exceptions which form part of the conditions of towage. I think, therefore, that we cannot base our judgment against the *West Cock* on the ground that the words "towing gear" do not include the attachments which I have described. Those attachments were for the purpose of towing, and could be used for no other purpose, and though our nautical assessors tell us that sailors would call this permanent structure part of the ship, it appears to me that it is essential to the carrying through of the towage, and, therefore, that answer of our assessors does not to my mind really affect the construction of the contract that we have before us.

I now propose, as the shortest way of dealing with the points that I think I ought to refer to, to read in the first instance the head-note to the report of the case in the Court below in the *Law Reports*. (1) It gives a shorter and clearer account of the question raised in this case than I can give in language of my own. It is as follows:—

"Whilst the defendants' tug was towing the plaintiffs' vessel from Birkenhead to the Canada Dock, Liverpool, the towing gear of the tug carried away, with the result that the plaintiffs' vessel fell against the pierhead at the entrance to the dock, and sustained damage. In an action for breach of the contract of towage, the defendants relied on a condition in the contract by which they were 'not to be responsible for any damage to the ship they have contracted to tow arising from any perils or accidents of the seas rivers or navigation collision straining or arising from towing gear (including consequence of defect therein or damage thereto) and whether the perils or things above mentioned or the loss or injury therefrom be occasioned by the negligence default or error in judgment of the pilot master officers engineers crew or other servants of the tug owners':—*Held* by the President, that the defendants were liable, as there was an implied warranty in the contract of towage that the tug supplied was duly equipped and fit for service; but the cause of the damage sustained by the plaintiffs' vessel was the defective condition of the rivets attaching the towing gear of the

(1) [1911] P. 23.

tug to her bunker casing. This defect was not covered by the contract, the conditions of which only applied to circumstances occurring after the commencement of, and during, the towage, and not to the state of things existing before the towage began."

My judgment is based upon that last proposition being absolutely correct. I think that the words of exemption in the contract, when reasonably construed, do not extend to defects existing before the towage began. It is not necessary for me, except very shortly, to refer to the arguments which were put forward on either side, but I may say that counsel for the appellant tug owners referred to two matters which they said should lead the Court to the conclusion that these words were intended to apply to matters and circumstances existing before the towage began, as well as to matters and circumstances after the towage began. The first matter to which they referred was the wording of the clause in brackets ("including consequence of defect therein or damage thereto").

The suggestion was that the words "defect therein" referred to defects existing before the towage began and that the words "damage thereto" referred to matters or circumstances arising after the towage began. That was the argument on one side. The argument on the other side was that if the words in this exception clause are looked at from the beginning to the end there is not—if you leave out the contention of counsel for the appellants about the effect of the word "defect"—a single instance mentioned which would not be of matters arising after the towage commenced. That was the way counsel for the respondents put it, and, having read the judgment carefully, and treating this contract as an ordinary contract—apart from the rule which renders it necessary to include a matter in the contract by plain and unambiguous language—I have come to the conclusion that, on the reasonable meaning of this contract, it was not intended that the defect existing—the shortness of the equipment, or the defect in the equipment—at the time the contract was made should be covered by this clause. When I say this, I am not taking the view that was taken by Stirling L.J. on the contract before him in the case of *Rathbone*

C. A. 1911

THE WEST COCK.

Vaughan Williams L.J.

Brothers & Co. v. *D. MacIver, Sons & Co.* (1), or by Collins L.J. in *Owners of Cargo of S.S. Waikato* v. *New Zealand Shipping Co.* (2), that the probable intention, at all events, of the tug owner was to protect himself against being made liable for damage done to the towed ship by reason of matters like these existing before the towage commenced. The more I read this contract, the more I come to the conclusion that it was the intention of both parties to deal only with defects and damage arising in the course of the towage.

I accept generally the conclusions of fact of the learned President. I think that that is the rule which the Courts of Appeal have laid down for themselves when dealing with these admiralty appeals; but it must not be taken that I mean the rule which is generally used is an exclusive rule. There may arise cases in which the Court of Appeal may think it its duty to differ from the judge of the Admiralty Court upon mere questions of fact, on which he, assisted by the Elder Brethren, has given a finding. It does not do that, however, except in cases where there is strong ground for thinking that the finding in fact was wrong.

I have set out for my own convenience the conclusions of fact of the President. He finds that "the accident was due to the weakness, fatigue, and defective condition of the eight rivets." I accept that conclusion, and, with reference to it, I wish to say that I take the view that in an ordinary contract in which the contracting party is under an obligation to use reasonable care and skill, without any warranty of equipment or anything of the sort, if, in the course of the contract to tow, an accident happens, which damages the towed ship, that fact alone is sufficient to shift the onus, with the result that the moment that has occurred the onus is on the defendant tug owner to explain the accident, if I may use the expression. Until it has been proved that the accident occurred in the course of the towage, the onus is upon the plaintiff shipowner, but when he shews that his ship has been injured in the course of the towage, I think the onus shifts, and it is for the defendant tug owner to explain how the accident occurred, and relieve himself from liability for the accident by

(1) [1903] 2 K. B. 378. (2) [1899] 1 Q. B. 56.

shewing that there was no negligence or want of reasonable care and skill on his part.

The learned President has found that "at the time of the contract, and at the commencement of the towing operations, the *West Cock* was inefficient . . . . to perform the towage services," and "that this inefficiency could have been ascertained by reasonable care, skill, and attention on the part of the tug owners; that no proper inspection of the tug was made by them or their servants before the towage contract was entered into; and that the last inspection before the contract was only an ordinary and perfunctory one."

Although I accept the finding of the learned President, I do not mean to say that I should have come to the same conclusion that in this tug the rivets in the plates came away by mere weakness, making them unable to stand the strain of $22\frac{1}{2}$ tons, or 45 tons, whichever way it is put. I think it quite possible that I should have come to the conclusion that the inability to stand the strain was not the real cause, but something in the nature of a jerk, for which, of course, if there was an absolute warranty, they would have to bear the liability. However on the facts it is unnecessary for me to say anything more, but the President does refer to his own decision in *The Maréchal Suchet* (1), and he does in the course of that judgment make observations which he bases upon the decision in the case of *The Ratata* (2) and the observations of Lord Halsbury in the House of Lords. In so far as the President draws the inference as to the shifting of the onus of proof I entirely agree, but in so far as he says that the judgment of Lord Halsbury justifies the statement that there is a common law warranty in such a case as this I cannot agree. I should have thought that of the two the authority is rather the other way. However, it is not necessary that I should go through these matters at length. I have been through the cases which have been cited, beginning with *The Minnehaha* (3), as to which I make the same observation as I do with regard to *The Ratata*. (2) As to the other cases, they are all cases which, to my mind, refer to different contracts entirely

(1) [1911] P. 1. (2) [1898] A. C. 513.

(3) Lush. 335.

C. A. 1911

THE WEST COCK.

Vaughan Williams L.J.

—contracts of carriage, in respect of which it is sufficient for me to say that it must not be taken that I assent to anything except to the proposition that the particular exception in this case is limited to matters coming into existence after the towage began, and does not apply to matters existing before it began. I think, therefore, that this appeal must be dismissed.

FARWELL L.J. I also am of opinion that this appeal fails.

I see no reason to doubt the correctness of the findings of fact of the President, and, accepting those facts, it would be unnecessary to go further, because, as the learned President himself says in his judgment, "If my findings of fact in this case are justified, it matters not whether this primary obligation is an absolute one, so as to amount to a warranty of fitness or efficiency, or whether the obligation is satisfied by the tug owner proving that the unfitness or inefficiency was not discoverable or preventable by any care or skill, or by his proving that he was not aware of the unfitness or inefficiency, and that it could not be discovered by an ordinary inspection." But, inasmuch as the President has, in a learned and careful judgment, if I may venture to say so, gone very fully into matters, and as the case has been discussed in this Court for nearly three days, I feel bound to say a few words on the two questions raised.

The first question is, What is the liability of the tug owner, apart from the special words of the contract? The second is, What is the construction of the contract? The learned President has said that there is an absolute obligation on the tug owner amounting to a warranty, which he likens to the obligation under a contract of affreightment, to provide a vessel seaworthy in its commercial and legal sense. I am not, as at present advised, prepared to assent to that. I do not say that I dissent from it. I should require more time to consider all the authorities if I had to pronounce a final opinion, but I will say in two or three sentences why I feel a difficulty at present in accepting it. "Seaworthiness," according to Parke B. in *Gibson* v. *Small* (1), is part of the common law of England, and "there is ample

(1) (1852) 4 H. L. C. 353, at p. 397.

authority that a warranty or condition of seaworthiness at the commencement of the risk is implied in all voyage policies, whether it has been adopted originally from the law merchant, or implied from the very nature of the contract itself." The majority of this Court, of whom I was one, have inferred from the common law liability of a common carrier a corresponding liability on the consignor of the goods who calls upon him to perform the duty to him which he is bound by common law (with certain qualifications) to accept: *Bamfield* v. *Goole and Sheffield Transport Co.* (1); but it is quite a different matter to extend the category of common law warranties by adding another one to them, that is to say, by adding to tugs and tug service to ships the liability for cargo carried. As at present advised I express no opinion on that at all.

On the other two points I agree with the learned President and with my Lord also. I think the liability may be very well stated as Lindley J. put it in respect to the contract of carriage in *Hyman* v. *Nye.* (2) He says (I alter it so as to apply to a tug owner): "His duty appears to me to be to supply (a tug) as fit for the purpose for which it is hired as care and skill can render it; and if whilst (the tug) is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to shew that the breakdown was in the proper sense of the word an accident not preventible by any care or skill." Then a little lower down he says: "As between him and the hirer the risk of defects in (the tug), so far as care and skill can avoid them, ought to be thrown on the owner of (the tug). The hirer trusts him to supply a fit and proper (tug), the lender has it in his power not only to see that it is in a proper state, and to keep it so, and thus protect himself from risk, but also to charge his customers enough to cover his expenses." That, in my opinion, applies as much to a tug as to a carriage. The same principle was adopted in the case of the refrigerator in *Owners of Cargo of Maori King* v. *Hughes.* (3) I therefore think that on that point the learned President was amply justified in the judgment that he gave.

(1) [1910] 2 K. B. 94. (2) 6 Q. B. D. 685, at p. 687.
(3) [1895] 2 Q. B. 550.

C. A. 1911

THE WEST COCK.

Farwell L.J.

Then is there anything in the express words of the contract to relieve the tug owner from his liability? In my opinion there is not. Again I adopt what my Lord has said. I do not call in aid the somewhat stringent rule of construction which requires very clear words to exclude common law obligation as distinguished from contractual obligation, a rule which amounts practically to this, that the words must bear the meaning contended for, not merely that they may bear it on one of two possible constructions. When dealing with obligations arising ex contractu, no such rule can properly be invoked, and therefore I do not rely on the case of *Nelson Line (Liverpool), Ld.* v. *James Nelson & Sons, Ld.* (1), or any cases of that class, and to that extent I venture respectfully to differ from the learned President in the Court below. But on the construction itself I have nothing to add to what has been already said, both in this Court and in the Court below. It is clearly limited to the period of towage. The liability was an antecedent liability, and it is impossible to read the word "defect" as extending the protection to a period beyond that which governs the whole period. Such a forced rule of construction I think never would be applied, and certainly not in a case like this.

Further, I do not agree with the view that the learned President has taken as to the meaning of the words "towing gear." According to our nautical assessors the bulkhead itself, into which the rivets were fixed, is part of the ship, and not part of the towing gear, and secondly the rivets and the angle iron are both of them not parts of the towing gear, but the means by which the towing gear is attached to the ship. That, to my mind, is a material circumstance. Without saying that "towing gear" is a technical phrase in the sense that the Court takes expert evidence of it, it is material to consider what "towing gear" means amongst seafaring men; and as our assessors take that view, and as it entirely accords with my own, I propose to adopt that reading of it. I agree that the appeal must be dismissed.

KENNEDY L.J. I do not propose to decide this case upon a question as to the correctness or incorrectness of the view

(1) [1908] A. C. 16.

expressed in the judgment of the learned President of the Admiralty Division that, in the relation—for I desire to use a neutral term—between the shipowner who employs the tug owner, and the tug owner who undertakes to provide a tug for a given service, the choice of the tug remaining with the tug owner, there is to be implied, whether you call it a duty or an obligation or a warranty, an engagement of an absolute nature that the tug shall be in all respects absolutely fit for the service. It is expressed by the learned President in the words "The canon of construction to be applied is similar to that which has so frequently been applied in 'seaworthiness' cases," and this the President states, in the case of a tug, to be, in his opinion, in the case of the ordinary contract "a warranty of fitness." I do not wish to decide that point in this case. It is not necessary, in my opinion. I only desire to say this, that I do not myself feel assisted, in dealing with the question, by considering whether or not such a warranty, in the cases where it is implied,—as in the case of the carrier of goods—is to be treated as arising from an obligation under a contract, or as arising from a common law duty. I may say that, looking at the authorities, it is very difficult to say which of the two views is the more correct. It is quite true that, as in the passage quoted by Farwell L.J., the warranty of seaworthiness in the case of the carrier has been historically treated as a warranty arising directly out of the common law, but, on the other hand, authorities, to whom I should humbly bow, have repeatedly spoken of the obligation as one arising out of the contract itself, as an implied term. Take the judgment of Lord Cairns in *Steel* v. *State Line Steamship Co.* (1) The argument which he there presents as a dilemma for the shipowner is based upon a consideration of the obligation of seaworthiness arising as an implied term of the contract. He summed it up in this sentence: "But, my Lords, if that is so,"—that is to say if the dilemma I have put is correct—"it must be from this, and only from this, that in a contract of this kind there is implied an engagement that the ship shall be reasonably fit for performing the service which she undertakes. In principle I think there can be no

(1) 3 App. Cas. 72, at p. 77.

C. A. 1911

THE WEST COCK.

Kennedy L.J.

doubt that this would be the meaning of the contract." Lord Blackburn, dealing with the same argument, says (1): "I take it, my Lords, to be quite clear, both in England and in Scotland, that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a 'warranty,' not merely that they should do their best to make the ship fit, but that the ship should really be fit."

I desire to reserve my opinion whether the relation between the tug owner and the owner of the ship, arising out of an arrangement for towage, is or is not one which carries with it an implied duty, warranty, or obligation of an absolute kind. The facts of the case render it unnecessary to decide that question here. The nature of the engagement here is, I think, essentially like the engagement which was dealt with by the Divisional Court in *Hyman* v. *Nye* (2), and it cannot be said that in this case a less duty exists than existed in that case. As I understand the judgment, the important question is as to the knowledge of the seller or the hirer as to the specific purpose to which the thing sold or hired is to be applied; and in that case the learned judge had, in the opinion of the Divisional Court, left the question to the jury in the wrong way. The case is put shortly by Mathew J. (3): "The learned judge appears to have considered that the plaintiff by his pleadings had undertaken to prove negligence, and to have told the jury that if they thought reasonable care and precaution had been taken by the defendant to ascertain that the carriage was safe, they might find that it was safe. In other words, the question whether the carriage was safe, was treated as if it were the same with the question whether the defendant might have reasonably believed it to be safe." So, in the present case, it would, in

(1) 3 App. Cas. at p. 86. (2) 6 Q. B. D. 685.
(3) Ibid. at p. 689.

my opinion, have been insufficient, and was treated by the learned President to be insufficient, for the defendants to prove that they might reasonably have believed this tug to be safe. The truth is that in a case of this kind, where something has been used for a specific purpose known to both parties to be intended at the time of making the contract, there is very little to choose between an absolute duty and a relative duty. As Lindley J. expressed it (1), "In a case like the present, a carriage to be reasonably fit and proper must be as fit and proper as care and skill can make it for use in a reasonable and proper manner, that is, as fit and proper as care and skill can make it to carry a reasonable number of people, conducting themselves in a reasonable manner, and going at a reasonable pace on the journey for which the carriage was hired, or (if no journey was specified) along roads or over ground reasonably fit for carriages. A carriage not fit and proper in this sense would not be reasonably fit and proper, and vice versa. The expression 'reasonably fit' denotes something short of absolutely fit; but in a case of this description the difference between the two expressions is not great."

The burden of proof, in such a case as the present, lies upon the tug owner to shew that it was as reasonably fit and proper a tug for use as skill and care could make it. The same view, as that of the Divisional Court in *Hyman* v. *Nye* (2), was expressed in the later case of *Robertson* v. *Amazon Tug and Lighterage Co.* (3). There Brett L.J. said: "When there is a specific thing, there is no implied contract that it shall be reasonably fit for the purpose for which it is hired, or is to be used. That is the great distinction between a contract to supply a thing which is to be made and which is not specific, and a contract with regard to a specific thing. In the one case you take the thing as it is, in the other the person who undertakes to supply it is bound to supply a thing reasonably fit for the purpose for which it is made."

A different set of considerations would have arisen in the present case if the owner of the ship had picked a particular tug and not left it, as he did, to the defendants to supply a tug, which

(1) 6 Q. B. D. at p. 688. (2) 6 Q. B. D. 685.
(3) (1881) 7 Q. B. D. 598, at p. 606.

C. A. 1911

THE WEST COCK. [Kennedy L.J.

they knew was to be used for the purpose of towing the *Araby*. According to the law as laid down in *Hyman* v. *Nye* (1), upon the alternative view pointed out by the President as sufficient, this appeal fails as much as if the contract created an absolute warranty. He describes what I may call the qualified obligation as "an implied obligation to provide a tug in a fit and efficient condition so far as skill and care can discover its condition." I accept that statement as correct.

With regard to the facts, I should be exceedingly slow to differ from the findings of the judge who heard the evidence. In admiralty cases those findings embody not only the opinion of the judge who has heard the evidence, but the opinion of a judge on highly technical matters in which he has the assistance of skilled assessors. The Elder Brethren advised the learned judge in the present case upon questions of fact within the sphere of their duty, and I see no reason for supposing there was any mistake or misunderstanding. It was proved that no one had ever heard, in the circumstances of such a towage, of the structure of the vessel, whether you call it part of the towing gear or not, parting before the towing ropes. The burden of proof, as I think is pointed out by Lord Halsbury in *The Ratata* (2), lay upon the tug owners to shew that there was something which would excuse the failure to perform the service. The evidence is that, so far from there being any explanation, what happened was an unheard of thing, and there was no unusual or excessive strain which might not reasonably have been expected. Therefore the tug owners did not satisfy the burden of proof which lay upon them.

It appears to me that the foregoing considerations are quite sufficient to dispose of this case. Further, I am myself inclined to think that even if there was only a qualified contract, and not an absolute contract of fitness, the principle which has been so often referred to, of seeing, where there are exceptions, whether those exceptions are sufficiently clear to avoid the obligation of the implied contract, would have to be considered in this case; in other words, what is called the ambiguity question would arise just as much as it would arise in the case

(1) 6 Q. B. D. 685. (2) [1898] A. C. 513, at p. 517.

of an absolute contract. I do not think the terms of exception are sufficiently clear, as they stand, so as to vary the implied contract or obligation to provide a tug in a reasonably fit condition. If it was intended to negative this by the word "defect," then I think it should have been put clearly in the contract, that the word "defect" is to apply before as well as after the towage begins. I think, however, we are relieved from all difficulty on this point by the answers of our assessors. The questions which we have put to our assessors and the answers which we have received are as follows:

"Is the bulkhead of the tug to which the angle bar was attached usually called 'towing gear'? Is it spoken of by sailors as part of the ship, or part of the towing gear?—We should not call the bulkhead of the tug, as spoken of by sailors, part of the towing gear.

"Does your answer extend to the rivets or attachments as well?—From a sailor's point of view, the rivets and attachments (angle bars) are not termed the towing gear. The rivets secure the plates and the angle bars to which the towing gear is attached.

"Would the fact of the hawser being only fifteen fathoms materially increase the jerking strain on the rope?—Yes."

I should not presume to differ from our assessors upon such questions of technical and nautical skill. The learned President in the Court below, when referring to the words "towing gear," said this: "Although I do not desire my judgment to rest upon it, the defendants could not complain if a strict meaning were given to the words 'towing gear' in the conditions by holding that they describe merely the actual towing gear itself, and not the rivets or attachments between the gear and the bulkhead. This is the meaning the defendants themselves have given to the words. They persisted in the correspondence that 'all the towing gear' was lost overboard. The rivets were not so lost; the defendants knew they had remained in the bulkhead casing. If this be the right meaning, the defect which caused the accident is not within the words of the conditions at all."

I cannot help joining in the regret of the President that the defendants did throw away those rivets instead of keeping them

C. A. 1911

THE WEST COCK.

Kennedy L.J.

for inspection. It would probably have saved these proceedings, because if it had turned out that they were fatigued rivets, I do not think this question would have been fought in the way it has been. I think on all grounds this appeal ought to be dismissed.

Solicitors for appellants (defendants); *Hill, Dickinson & Co., Liverpool.*

Solicitors for respondents (plaintiffs): *Lightbound, Owen & MacIver, Liverpool.*

T. L. M.

1911

April 27, 28; *May* 3, 17, 19.

THE UMSINGA.

Admiralty—Ship—Collision—River Thames—Port of London—Compulsory Pilotage—"Master"—The General Pilotage Act, 1825 (6 *Geo.* 4, *c.* 125), *s.* 59—*Thames By-laws,* 1898, *arts.* 4, 14.—*Duty of Look-out in the River Thames.*

The defendants' steam vessel, belonging to the port of London, whilst proceeding, in charge of a duly licensed Trinity House pilot, down the river Thames, bound from London to East Africa with cargo and passengers, came into collision, through the fault of the pilot alone, with some tugs and barges of the plaintiffs in Bugsby's Reach. In an action of damage by collision:—

Held, by Sir Samuel Evans, President (following *The Hankow*, (1879) 4 P. D. 197), that the defendants were not liable, as pilotage was compulsory, the port of London, within which the collision occurred, being a port in relation to which particular provision, for the appointment of pilots, has been made by charter and by Act of Parliament, within the meaning of 6 Geo. 4, c. 125, s. 59.

The master of the defendants' steam vessel was not on the bridge for four or five minutes prior to the collision:—

Held that, though by art. 14 of the Thames By-laws, 1898, the "master of every steam vessel navigating the river shall be . . . . on the bridge," the voluntary absence of the master did not amount to default for which the owners of the vessel were liable, as a competent officer was left with the compulsory pilot on the bridge, and there were no special circumstances of difficulty, or no special matters within the knowledge of the master of which he ought to have been ready to inform the pilot.

Quære, whether, under the definition of "master" in art. 4 of the

same rules, the pilot, being in charge by compulsion of law, was not the "master" for the time being.

A look-out cannot report every light he sees in the river Thames; but he must report every material light as soon as it becomes material.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were William Cory & Son, Limited, owners of the tugs *Harlow*, *Grappler*, *Reliance*, and *Growler* and of the barges *Apollo*, *Edwin*, *Turkey*, and *Aqua*.

The defendants were the owners of the steamship *Umsinga*.

The case is reported on the question of the effect of the provisions of s. 59 of the General Pilotage Act, 1825, in respect of compulsory pilotage in the case of a vessel belonging to the port of London, whilst navigating in that port, but outward bound with passengers (1), and as to the meaning to be attached to the word "master" in art. 14 of the Thames By-laws. (2)

On October 8, 1909, about 8.30 P.M., the weather being fine and clear, the wind westerly, moderate, and the tide the last of the flood with a force of about half a knot, the *Umsinga*—a steel screw steamship, belonging to the port of London (3), of

(1) 6 Geo. 4, c. 125, s. 59: "Provided always, and be it further enacted, that for and notwithstanding anything in this Act contained, the master . . . . of any ship or vessel not exceeding the burthen of 60 tons, and having a British register, except as hereinafter provided, or of any other ship or vessel whatever whilst the same is within the limits of the port or place to which she belongs, the same not being a port or place in relation to which particular provision hath heretofore been made by any Act or Acts of Parliament, or by any charter or charters, for the appointment of pilots, shall and may lawfully and without being subject to any of the penalties by this Act imposed, conduct or pilot his own ship or vessel when and so long as he shall conduct or pilot the same without the aid or assistance of any unlicensed pilot or other person or persons than the ordinary crew of the said ship or vessel."

(2) Thames By-laws, 1898:

4. "The word 'master' when used in relation to any vessel means any person whether the owner master or other person lawfully or wrongfully having or taking the command charge or management of the vessel for the time being."

14. "The master of every steam vessel navigating the river shall be on one of the paddle-boxes or on the bridge of such steam vessel and shall keep or cause to be kept a proper look out during the whole of the time it is under way and shall remove or cause to be removed any person other than the crew who shall be on the paddle-boxes or bridge of such steam vessel."

(3) The port at which a British ship is registered for the time being

1911

THE UMSINGA.

2958 tons gross register, with engines of 460 horse power nominal, and manned by a crew of sixty-eight hands—was proceeding down Bugsby's Reach of the river Thames, on a voyage from London to Beira with a general cargo and thirty-two passengers. She was in charge of a duly licensed Trinity House pilot, and was making from three to four knots through the water with her engines working slow. Her regulation lights were duly exhibited and a good look-out was being kept on board of her, when, instead of keeping out of the way of the plaintiffs' barge roads and tug roads off Charlton, the *Umsinga*, under the circumstances detailed in the following judgment, struck the barge *Apollo*, breaking through the barge roads, setting some of the craft adrift, and driving the barge *Aqua* against the tug *Harlow*, breaking her adrift and damaging the other craft and tugs above mentioned.

The defendants admitted the collisions with certain barges and tugs belonging to the plaintiffs whilst lying at their barge and tug roads off Charlton, but denied that the collisions were caused by the negligence of their servants, and by paragraph 4 of the defence said that "if, and in so far as, the collisions and damage were caused by the negligent navigation of the *Umsinga*, such neglect or default was solely that of the pilot of the *Umsinga*, who was a duly qualified pilot acting in charge of the *Umsinga* within a district wherein his employment as pilot was compulsory by law, and that for his fault or incapacity the defendants are not answerable."

The case came on for hearing on April 27, 1911, before the President, assisted by two of the Elder Brethren of the Trinity House. The facts relating to the collision and the arguments of counsel as to art. 14 of the Thames By-laws fully appear from the following preliminary judgment delivered on April 28. On the question of the alleged failure of the master and crew to afford the pilot of the *Umsinga* proper assistance, the cases of *The Velasquez* (1) and *The Tactician* (2) were cited; on the

---

shall be deemed her port of registry and the port to which she belongs: Merchant Shipping Act, 1894, s. 13.

(1) (1867) L. R. 1 P. C. 494.

(2) [1907] P. 244, at p. 250.

question of whistling, *The St. Paul* (1); and as to the duty of the look-out in reporting lights in the river, *The Skakkeborg*. (2)

May 3. SIR SAMUEL EVANS, PRESIDENT. The defendants' steamship, the *Umsinga*, came into collision with certain barges and tugs belonging to the plaintiffs, properly moored in barge and tug roads in Bugsby's Reach, on the south side of the Thames, and caused damage.

The *Umsinga*, outward bound, was proceeding down Bugsby's Reach in charge of a pilot duly licensed by the Trinity House. He was one of the choice pilots of the defendants' line. The weather was fine. Neither weather, nor wind, nor tide played any material part in the collision.

There were hardly any craft under way in the reach. In fact, only two such craft were proved to be in the reach. One was a sailing barge; she was to the northward of the *Umsinga*, and at one time headed south, shewing her green light; but she afterwards put about. The pilot said, and repeated positively, that this sailing barge gave him no trouble, and had nothing to do with the collision. The other was a tug, the *Rotifer*, with which I will deal hereafter. It was said that another craft, a barge under oars, was near at the time. A witness named Davies, who described himself as an "outside witness," gave evidence as to this barge. He never saw the sailing barge above referred to, nor the tug *Rotifer*. No witness for the plaintiffs saw or made any mention of Davies or his barge. I cannot accept Davies' testimony, and this barge under oars can be dismissed from further consideration.

The tug *Rotifer* had brought up river a dumb barge (the *Rivulet*), lashed to her starboard side. She had intended to make fast and leave this barge on the outside of the coaling station on the south side of the river, where some of the damaged barges were moored. She turned round under a starboard helm, so as to get the barge alongside on the outside of the roads. The watchman of the coaling station, however, directed the *Rotifer* to bring the barge inside the roads. The *Rotifer* thereupon

(1) [1908] P. 320, at p. 324; [1909] P. 43, at p. 54.

(2) See note, p. 245, post.

1911

THE UMSINGA.

The President.

went on a port helm under the stern of the coaling station, and she had got inside the roads before the collision happened.

There was no difficulty in the way of the safe navigation of the *Umsinga*. Nevertheless she headed right into the roads and collided with various barges and tugs which were moored there. This can only be accounted for by negligence, or error, in her management. The pilot said he did not manœuvre her in relation to the sailing barge. I am of opinion, however, upon the verbal evidence and the documents, that he did give an order to port with reference to the green light of that barge. Later, he ported still more, intending to go astern of the *Rotifer*, whose lights he saw. He stated that the *Rotifer* had gone out of the roads, was making way to the northward, and came to bear a little on his port bow; that the tug afterwards went astern, causing him difficulty, and that he therefore starboarded his helm.

Upon the whole of the evidence I cannot accept this story. I have come to the conclusion that the pilot ported too much, starboarded too late, and failed to stop and reverse his engines in proper time. I am clearly of opinion, and in this opinion the Elder Brethren fully concur, that the collision was due to the error or fault of the pilot. The defendants pleaded and contended that the pilot was solely to blame, and that they were relieved from liability by the statute. On the part of the plaintiffs it was contended that the defendants had not shewn that the pilot was solely to blame. On the contrary, it was said that the master and officers of the *Umsinga* were negligent, or partly in fault, in that they had not performed their duties, and had not rendered the assistance which they ought to the pilot. Firstly, it was argued that there was a bad look-out on board the *Umsinga*. The chief officer was on the look-out on the forecastle head, with the ship's carpenter standing by the windlass. The chief officer was a competent and experienced man. I am satisfied that he kept a good look-out, and made all the necessary reports to the bridge at the proper time. On the bridge were the pilot, the third officer (at the telegraph), and a lascar (at the wheel). The third officer held a first mate's certificate, and it was not suggested that he was not a capable

1911

THE UMSINGA.

The President.

and reliable officer. The orders of the pilot were duly attended to and obeyed. Secondly, it was argued that the sound signals were not given, in accordance with the Thames Rules, when the helm was ordered to be ported twice, and at the last to be starboarded; and that the officers of the vessel were to blame for this. In fact, no order to whistle was given by the pilot. Counsel for the plaintiffs argued, nevertheless, that the ship's officer on the bridge should have blown the whistle signals when the helm orders were given, although the pilot did not direct this to be done. The contention, on the other hand, of counsel for the defendants, was that the directions to sound the whistle should come from the pilot, and that he had a discretion as to whether, and when, they should be given. But this point, as counsel for the plaintiffs said, did not arise if the story put forward by the *Umsinga* that the *Rotifer* was making for the north bank, outside the roads, and that she afterwards went astern, was not accepted. I do not accept that story. The point, therefore, does not arise for decision in this case, and need not be further discussed. A similar point appears to have been expressly left open by the Court of Appeal in *The St. Paul.* (1)

The remaining contention—which was put by counsel for the plaintiffs as part of the alleged bad look-out—was that the master of the *Umsinga* was not on the bridge at the time of the collision, and that, therefore, he was in fault. He had left the bridge four or five minutes before the collision. It was not suggested that necessity required him to go. He said he told the pilot that he was going down for a few minutes. The pilot did not remember this; but he did not miss the master. The master was on his way back just about the time the accident happened.

The third officer, who was on the bridge, was a competent officer. He pointed out various matters to the pilot. The pilot did not pretend that he required any further assistance, or that the circumstances called for the attendance on the bridge of the master himself, in addition to the officer and the man at the wheel.

I have said that the navigation of the vessel in the state of the

(1) [1909] P. 43, at pp. 54, 56

1911

THE UMSINGA.

The President.

weather, and in the conditions which prevailed in the reach, was singularly free from difficulty; but it was argued on the part of the plaintiffs that rule 14 of the Thames Rules makes it obligatory for the master himself to be on the bridge at all times within the limits to which the rule extends. It has never been held, or contended, so far as I am aware, that this rule requires the presence of the master on the bridge at all times and in all circumstances—within the range of the rule—when the vessel is in charge of a compulsory pilot. It is easy to conceive cases in which, even apart from any such rule, a master must be on the bridge before it can be rightly said that all the assistance which the law requires to be given to the pilot by the master and crew is given, and in which his absence might be evidence of negligence or of default. Indeed, in most cases in rivers like the Thames I should consider it very advisable that the master should be on the bridge with the pilot, although the pilot is in charge of the vessel for the time being. But, in my opinion, it cannot be held as a matter of law, or as an inflexible rule of good navigation, that the master must be there, and that his absence amounts to default for which the owners are liable, when he provides a competent officer, or where there are no special circumstances of difficulty, or no special matters within his knowledge of which he ought to be ready to inform the pilot. It is very doubtful whether, when a compulsory pilot is in charge, the pilot is not "the master" within the meaning of rule 14 (see the definition of "master" in rule 4). If by "master" in rule 14 is meant "the master of the vessel," the rule apparently requires him to remove the pilot himself from the bridge, as he is a person "other than the crew."

It is beside the question to inquire whether the master, if on the bridge, might by suggestion, or advice, or other legitimate intervention, have caused the pilot to avoid the collision. If he is not there, and is not bound by law, or by the rules of good navigation, to be there, the Court cannot surmise what he would have done if he was there, in order to fasten liability on the owner for the fault of the compulsory pilot.

In the circumstances of this case, I find that the collision was solely due to the fault of the pilot. I understand that counsel

for the plaintiffs wish to argue that pilotage was not compulsory in this case. If they do, I postpone my formal judgment until that question has been argued and determined.

Counsel for the plaintiffs intimated that they wished to argue the point of compulsory pilotage, and that question was therefore reserved.

May 17. The question of compulsory pilotage was argued, the defendants beginning.

Laing, K.C., and *Dawson Miller*, for the defendants, the owners of the *Umsinga*. The Act of 1894 (57 & 58 Vict. c. 60), consolidating enactments relating to merchant shipping, reproduces, by ss. 603 and 622, the provisions, so far as material for present purposes, of ss. 353 and 376 of the Act of 1854 (17 & 18 Vict. c. 104), and, therefore, the arguments of counsel for the defendants in the case of *The Hankow* (1), in 1879, with reference to those sections of the Act of 1854, are applicable to the present state of the law, the result being that the exemption from compulsory pilotage contained in s. 59 of the General Pilotage Act, 1825 (6 Geo. 4, c. 125), is preserved in favour of vessels when within the ports to which they belong; but, as pointed out in those arguments, this exemption is confined, by the express terms of the section, to vessels belonging to ports or places in relation to which no particular provision for the appointment of pilots has been made by Act of Parliament or charter. Counsel for the defendants, in that case, then proceed to shew that "a particular provision for the appointment of pilots" was made prior to 6 Geo. 4, namely, by a charter (2) granted to the Trinity Corporation by King James II. with reference to the port or place where the collision occurred, which was in the port of London.

In the report of *The Hankow* in the Maritime Law Cases (3) there is appended a note by the late learned editor, in which, after referring to the original pilotage law affecting the *Hankow* as an inward-bound vessel from Australia—namely, (1716)

(1) 4 P. D. 197, at pp. 199, 200. (2) Set out at ibid., p. 198.
(3) 4 Asp. M. L. C. 97, note (*a*).

1911

THE UMSINGA.

3 Geo. 1, c. 13, s. 1; (1720) 7 Geo. 1, stat. 1, c. 21, s. 14; (1732) 5 Geo. 2, c. 20, s. 12; (1803) 43 Geo. 3, c. 152; (1808) 48 Geo. 3, c. 104—he adds, on the question whether the charter of James II. has any bearing on the matter, that there was, at the time of the passing of the Merchant Shipping Act, 1854, either by the Trinity House charter, or by 3 Geo. 1, c. 13, particular provision in force for the appointment of pilots to pilot vessels entering the Thames, and no exemption for vessels belonging to the port of London.

It is submitted that the case of *The Hankow* (1), decided more than thirty years ago, will be deemed binding on this Court, and decisive of the point now contended for on behalf of the defendants in this case, namely, that the employment, at the time and place, of the pilot on board the *Umsinga* was compulsory by Act of Parliament or charter within the meaning of 6 Geo. 4, c. 125, and, therefore, as the pilot has been found alone to blame, the defendants are not liable for the damage occasioned by the collision.

[In addition to the cases and statutes mentioned in the judgment (namely, *The Hankow* (1), *The Killarney* (2), *The Stettin* (3), and *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (4), 48 Geo. 3, c. 104, 6 Geo. 4, c. 125, Merchant Shipping Acts, 1854 and 1904) reference was made to the case of *The Earl of Auckland* (5) and *Reg.* v. *Stanton* (6) and to Temperley's Merchant Shipping Acts, 2nd ed. p. 350.]

A. D. Bateson, K.C., and *R. H. Balloch*, for the plaintiffs, William Cory & Son, Limited. The decision in *The Hankow* (1), upon which the defendants rely, cannot be sustained, for, though there is a general provision for pilotage in the river Thames and waters adjacent thereto, the port of London is not "a port or place in relation to which particular provision hath heretofore been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots" within the meaning of the section (59) of the General Pilotage Act, 1825 (6 Geo. 4, c. 125).

The charter granted to the Trinity Corporation by King

(1) 4 P. D. 197.
(2) (1862) Lush. 427.
(3) (1863) Br. & L. 199.
(4) (1868) L. R. 3 Ex. 330; (1869) L. R. 4 Ex. 238.
(5) (1861) Lush. 164, 387.
(6) (1857) 8 E. & B. 445.

James II. only deals with the safe bringing up of vessels "into (or out of) our river of Thames" and does not purport to make any "particular" provision for the port of London as such, and, as pointed out in the note of the late learned editor of the Maritime Law Cases (1), referred to by counsel for the defendants, the charter in question, for the reasons there given, "could not have affected the case of a ship (like the *Hankow*), inward bound having passed Dover."

Text-writers throw doubt on the correctness of the decision in *The Hankow* (2): see Marsden on Collisions at Sea, 5th ed. p. 244, note (*l*) (3), where reference is made to (1812) 52 Geo. 3, c. 39, s. 32; (1808) 48 Geo. 3, c. 104, s. 29; (1823) 4 Geo. 4, c. 77; and to certain Orders in Council.

As to the cases: *The Killarney* (4) has no application to the present case, for, as pointed out in the argument of counsel for the plaintiffs in *The Hankow* (2), it was proved to the Court in *The Killarney* (4) that a particular provision had been made, by (1812) 52 Geo. 3, c. 39, s. 21, for the appointment of pilots by the Hull Trinity House, for ships into or out of ports within their jurisdiction, and such jurisdiction undoubtedly included the port of Goole. The decision in *The Killarney* (4) is, therefore, not referred to in *The Stettin* (5), in which latter case Dr. Lushington held that there was not any Act of Parliament which would apply. That case is supported by the opinion of Kelly C.B. in the case of *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (6), where the charter of James II. and the Acts making pilotage compulsory were referred to.

[Reference was made to the case of *Lucey* v. *Ingram* (7), and to the statutes: (1732) 5 Geo. 2, c. 20 (preamble, ss. 11, 12, 14); (1808) 48 Geo. 3, c. 104 (preamble, ss. 2, 20, 29, 55).]

Laing, K.C., in reply.

Cur. adv. vult.

May 19. SIR SAMUEL EVANS, PRESIDENT. The collision in this case took place in Bugsby's Reach in the river Thames.

(1) 4 Asp. M. L. C. 97, note (*a*).
(2) 4 P. D. 197.
(3) Repeated in 6th ed., note (*z*).
(4) Lush. 427.
(5) Br. & L. 199.
(6) L. R. 3 Ex. 330; L. R. 4 Ex. 238.
(7) (1840) 6 M. & W. 302.

1911

THE UMSINGA.

The President

Bugsby's Reach is between Lea Ness and Hook Ness. This is the portion of the river which lies, broadly speaking, between the West India Docks at the one end and the Royal Victoria Docks at the other.

I found that the collision was due solely to the fault of the pilot on the *Umsinga*, the defendants' vessel. The defendants say that at the place of collision pilotage was compulsory; the plaintiffs contend that it was not compulsory. Sect. 603 of the Merchant Shipping Act, 1894, provides that (subject as therein mentioned) the employment of pilots should continue to be compulsory in all districts where it was compulsory immediately before the commencement of the Act, but that all exemptions from that compulsory pilotage should continue to be in force.

Upon the authorities, the question whether the *Umsinga* was, at the time and place where the collision occurred, exempted from compulsory pilotage depends upon s. 59 of 6 Geo. 4, c. 125. The *Umsinga* belonged to the port of London. She was outward bound and carried passengers. The collision took place within the port of London. She was, in fact, in charge of a Trinity House licensed pilot at the time.

The question is, did the collision occur in a port or place in relation to which particular provision was made before the statute 6 Geo. 4, c. 125, either by any Act or Acts of Parliament, or by any charter or charters, for the appointment of pilots? If yea, pilotage was compulsory. If nay, the vessel was within the exemption from compulsory pilotage.

In my opinion this question was decided by the case of *The Hankow*. (1) That decision was pronounced in 1879. Fifteen years afterwards the Merchant Shipping Act, 1894 (which no doubt is almost, but not quite, a purely consolidating statute), was passed. Both long before, and ever since, 1879 the practice has been to treat the Thames as a port or place where pilotage is compulsory. Whether I thought *The Hankow* (1) was rightly decided or not, I should feel bound to follow it in these circumstances, and after this lapse of time. Other cases which were cited and said to be inconsistent with it—namely, *The*

(1) 4 P. D. 197.

1911

THE UMSINGA.

The President.

Killarney (1), *The Stettin* (2), and *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (3)—were not decisions on the same point. But I wish respectfully to add that, in my opinion, the decision in *The Hankow* (4) was right not only on the ground upon which it was rested, namely, that the locus of the collision was in a port or place in relation to which particular provision for the appointment of pilots had been made by charter before the passing of 6 Geo. 4, c. 125, but also on the ground that such a provision had also been made before that time by an Act or Acts of Parliament. The Act then in force was 48 Geo. 3, c. 104. Other Acts to a similar effect had preceded this.

I hold upon the authority of *The Hankow* (4), and upon the words of s. 59 of the 1825 Act, that, at the place where the collision happened, there was no exemption from compulsory pilotage in the case of the *Umsinga*. The defendants are accordingly entitled to judgment, as the compulsory pilot was solely to blame.

Action dismissed with costs.

Solicitors for the plaintiffs, William Cory & Son, Limited: *Keene, Marsland, Bryden & Besant.*

Solicitors for the defendants, the owners of the *Umsinga: Thomas Cooper & Co.*

T. L. M.

THE SHAKKEBORG.

Bargrave Deane J.

NOTE.—The case of *The Skakkeborg* (referred to above, p. 237, as to reporting lights in the Thames) arose out of a collision in the lower part of Gravesend Reach of the river Thames and was tried by Bargrave Deane J., assisted by two of the Elder Brethren of the Trinity House, on April 10 and 11, 1911. In the result the *Skakkeborg* was found alone to blame for porting to a green light and not reversing sooner; but, in the course of his judgment, the learned judge dealt with the question of the proper mode of keeping a look-out in respect of reporting lights in the river Thames. The learned judge said:—In this case a collision occurred at about a quarter past nine on the evening of November 24, 1910, in the river Thames, about half a mile above the Ovens buoy. The two vessels were the *Wimbledon*, a steamship of 3767 tons gross register, which was bound up the river, and a

---

(1) Lush. 427.
(2) Br. & L. 199.
(3) L. R. 3 Ex. 330; L. R. 4 Ex. 238.
(4) 4 P. D. 197.

1911

THE SHAKKEBORG.

Bargrave Deane J.

Danish vessel, the *Skakkeborg*, of 1589 tons gross, which was bound down. The case is not altogether an easy one to decide, but I have come to a conclusion which is based upon one point, and that is whether these vessels, after the *Wimbledon* had rounded the Ovens buoy, were green to green or green to red. The *Wimbledon* was first sighted by those on the *Skakkeborg*, according to the evidence, when she was a quarter of a mile below the Ovens buoy, before she rounded, and at that time, undoubtedly, the *Skakkeborg* would have seen the green light of the *Wimbledon* and the *Wimbledon* would be on the port bow of the *Skakkeborg*. But after the *Wimbledon* rounded the Ovens buoy into the straight of the reach, I have come to the conclusion that these two vessels were green to green ; that coming round that very sharp bend of necessity the *Wimbledon* would get out more into the middle of the river, and that she would have the green light of the *Skakkeborg*, as her people say they had it, on her starboard bow. That would make them green to green, and so they approached, and then the first thing that happened was that the *Skakkeborg* blew a one-blast signal and ported. She seems to have then put her engines half-speed ahead. She ported a little more and blew again, and put her engines full speed ahead ; and then later on again, just before the collision, she hard-a-ported and gave a touch ahead again ; and then came the collision. [The learned judge then dealt with the entries in the engine-room log, and continued :—] Now you have got in the engine-room log full speed astern immediately before the collision. If it were immediately before the collision I can understand that there was not time to blow the three blasts, but the master of the *Skakkeborg* is in this position, that if it were so late as that she had not time to blow three blasts, then he put his engines full speed astern extremely late, whereas if he had reversed sooner, then there would have been plenty of time for him to blow his three blasts. The conclusion I have arrived at with regard to that is that the engine-room log is correct, and that the engines were put full speed astern only at the last moment.

Of course there is in the Thames a port-to-port rule (art. 46 of the Thames By-laws, 1898), but that does not apply when vessels have a clear eye to pass starboard to starboard, and when vessels are rounding the Ovens buoy into Gravesend Reach it stands to reason that they must almost inevitably at some time be green to green ; and if that is the case, then it is extremely difficult to say that steam vessels proceeding down ought to port across the bows of vessels coming up and rounding, as they must round, the Ovens buoy. In my opinion the port-to-port rule applies only when it is perfectly plain that the vessels can with ease pass port to port, and does not apply when vessels are green to green and in order to pass port to port must go right across each other's bows, as was done in this case.

Now the first point that is made against the *Wimbledon*, and indeed almost the only point, is bad look-out. With regard to that I have advice from the Elder Brethren, and they tell me that one has not got to construe the principle of ordinary look-out in the river Thames as you would in the open sea. You cannot report every light you see in the river Thames. You have to watch until you see a light, which, perhaps, you have seen before, becoming material, because if you are going to report every light in Gravesend Reach when coming up the river Thames the confusion would be

1911

THE SHAKKEBORG.

Bargrave Deane J.

something appalling to those in charge of the navigation; but you have to have a look-out to report every material light as soon as it becomes material. In this case I am advised, and I accept the advice given me, that there is nothing in the evidence before the Court to shew that there was a look-out upon the *Wimbledon* which was defective from the point of view of navigation; and that the *Shakkeborg* was seen at a sufficient distance off and reported at a sufficient distance off, to enable the navigation to be properly conducted. My own view is that there being no want of good look-out on the part of the *Wimbledon*, I have no other point upon which I can possibly attribute blame to her. Now with regard to the *Skakkeborg*. [The learned judge then dealt with the manœuvres of this vessel, and concluded:—] The result is that, basing my judgment upon the fact that before the first port-helm signal was blown by the *Skakkeborg* the vessels were green to green, I think the *Wimbledon* is blameless and the *Skakkeborg* is to blame for porting to a green light, and for increasing her speed, and not reversing in time to do some good, instead of waiting till the very last moment, when it was no use at all, before she reversed. I think the *Skakkeborg* is alone to blame.

Laing, K.C., and *Dawson Miller*, for the plaintiffs, the owners of the *Wimbledon*.

A. D. Bateson, K.C., and *D. Stephens*, for the defendants, the owners of the *Skakkeborg*.

Solicitors: *William A. Crump & Son; Thomas Cooper & Co.*

T. L. M.

1911

July 7, 8, 10, 11, 21.

THE PRESIDENT LINCOLN.

Admiralty—Ship—Collision—Compass Bearing—Regulations for Preventing Collisions at Sea, 1897, *art.* 17, *Preliminary.*

The defendants' steamship was proceeding to the eastward, near the Sandettie lightship in the North Sea, when those in charge observed, at a distance of some six miles, and about ahead, a white light which proved to be the masthead light of the plaintiffs' steamship, which was proceeding on a converging course in the opposite direction. Assuming that that light, and a second white light, belonged to a fishing boat, those in charge of the defendants' vessel disregarded them, and, in the ordinary course of navigation, starboarded the helm for the next lightship, thereby bringing about a collision with the plaintiffs' vessel, which was properly porting to keep out of the way:—

Held by Bargrave Deane J., that (apart from other contributing causes, rendering both vessels to blame) the initial cause of the collision was neglect by those in charge of the defendants' vessel to comply with the directions contained in the preliminary to art. 17 of the regulations for preventing collisions at sea, as to "carefully watching the compass bearing of an approaching vessel," for, if this had been done, it would have been ascertained that starboarding would involve risk of collision.

Action of Damage by Collision.

The plaintiffs were the owners of the Bristol steamship *Tasso.*

The defendants were the Hamburg Amerikanische Packetfahrt Actien Gesellschaft, owners of the steamship *President Lincoln.*

The case is reported on the necessity, when circumstances permit, of complying with the preliminary to art. 17 of the regulations for preventing collisions at sea, 1897, in order to ascertain whether there is risk of collision. (1)

The facts fully appear from the judgment.

1911. July 7, 8, 10, 11. *Laing, K.C.*, and *Hugh C. S. Dumas*, for the plaintiffs, the owners of the *Tasso.*

A. D. Bateson, K.C., and *Arthur Pritchard*, for the defendants, the owners of the *President Lincoln.*

Cur. adv. vult.

(1) Preliminary—Art. 17: "Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist."

1911

THE PRESIDENT LINCOLN.

Bargrave Deane J.

July 21. BARGRAVE DEANE J. In this case a collision occurred, near the Sandettie lightship, in the North Sea, on January 22 in this year, about 6 o'clock in the evening, between the steamship *Tasso* and the steamship *President Lincoln*.

The *Tasso* is a vessel of 1859 tons gross, manned by a crew of twenty hands, and she was on a voyage from Antwerp to Swansea with a general cargo. The *President Lincoln* is one of the Hamburg-American liners, and is a twin screw steamship of 18,167 tons gross, manned by a crew of 287 hands all told, and was on a voyage from New York, via Cherbourg, to Hamburg, with passengers and cargo.

The two vessels were approaching each other on converging courses. The course of the Hamburg-American boat was E. $\frac{1}{4}$ S., and that of the other vessel, at the time she was sighted, W. by S. $\frac{3}{4}$ S., and that would put them approaching each other, the starboard side of the *Tasso* to the port side of the *President Lincoln*. One of the first matters which I find in this case is that, at no time before the course was altered on the Hamburg-American boat, was the *Tasso* on her starboard side, but always on her port bow. That is a preliminary finding which affects the whole of my judgment.

The story told by the *Tasso* is this: that the master, who had been on the bridge, told the officer of the watch, the second officer, when he went below, that when the Sandettie lightship was sighted he should alter the course to W. by S. $\frac{3}{4}$ S., a point more southerly. The master, then being below, heard one blast blown upon the whistle, which indicated that his vessel was porting, whereas, according to the order he had given before leaving the bridge, she should have starboarded a point. He says that shortly afterwards he went up on the bridge, and both the second officer and he ascertained that the vessel was then heading W. by N. $\frac{1}{2}$ N., a variation of some $3\frac{1}{4}$ points. That signal would indicate to any vessel approaching her that she was altering her course, and being on the port bow of the Hamburg-American boat before she altered her course, it would take her still more on to the port bow of the Hamburg-American boat. The *Tasso* continued on that course, the lights of the *President Lincoln* getting as much as three points on the port bow, until the master and the second officer of the *Tasso* observed that her masthead lights were closing

1911

THE PRESIDENT LINCOLN.

Bargrave Deane J.

in, indicating that she was under a starboard helm. Thereupon the master of the *Tasso* says, and he is corroborated by the other members of his crew, that he ordered the helm hard-a-port and reversed his engines. That would throw his head still more to starboard, and that was the way in which his vessel was manœuvring at the time of the collision. I cannot find any fault with the *Tasso* so far as her navigation is concerned. She had the duty, having the other vessel on her starboard bow, of keeping out of the way, and, expecting the other vessel to keep her course, she ported and brought the other vessel on her port bow, and when afterwards she saw there was danger of collision she reversed her engines and hard-a-ported, which threw her head still more off to starboard.

Now let me take the case of the Hamburg-American boat. The *President Lincoln* at the moment was proceeding under the second officer's watch, but the master was on the bridge; and, although it was the second officer's watch, it is not disputed that the master was the moving spirit in what was done on the Hamburg-American boat. She set a course from the East Goodwin for the Sandettie lightship, and at the time of the collision—or rather just before the collision, before she altered her course—she had the Sandettie lightship on her starboard bow. The master and second officer on the bridge say that they saw a white light right ahead. They saw no coloured light, but after a little time they saw another white light a little below the other. What the second white light was we do not know. It may have been a fisherman's light, or it may have been some other vessel which had two lights, but they seem to have taken it for granted very early that they were fishermen's lights which they saw, and, accordingly, having another fisherman between that light and the Sandettie light, they determined to alter their course and make straight for the Haaks lightship, which meant starboarding their helm and crossing in front of the vessel which was shewing a white light. So far as that is concerned, if that is an absolutely satisfactory story, no one can complain about the starboarding if she believed there was nothing but a fisherman fishing in her way; but did she ascertain that it was a fisherman? We know as a fact that the other vessel was not a

1911

THE PRESIDENT LINCOLN.

Bargrave Deane J.

fisherman, but was the *Tasso*. Are the master and the second officer to be relied upon as to this light being right ahead? We have had two look-out men from the *President Lincoln*—one was in the crow's nest and the other on the forecastle head—and they both say that the white light which they saw was on the starboard bow, whilst the master and the second officer say it was right ahead. That is very unsatisfactory. I find as a fact that it was on the port bow.

What was the duty of those on the Hamburg-American boat? They had a white light ahead of them, and they ought, according to art. 17, to have taken certain steps. Art. 17 has the following preliminary paragraph. [The learned judge read the article already set out, and continued:] That imposes upon people who are navigating a ship the duty of observing a light which is ahead of them, to see whether it appreciably changes its position. You are not left to say, "Oh! I will wait and see if I can see a red light or a green light," but you must look and see if the light appreciably alters its position, and should deal with it by compass bearing. We know perfectly well that if those on the *President Lincoln* had done that they could not have missed seeing that this vessel, which, as I have said, was approaching them on the port bow, was getting so many points broader on the port bow and appreciably altering her position. If so, then there was undoubtedly risk of collision if they starboarded. They did not take the trouble to ascertain if the light was altering its position or not, but the master and the second officer seem to have taken upon themselves the assumption, without testing it, that this was a fishing vessel. In fact, it was a vessel going ten knots in an opposite direction to themselves, and they were going fourteen knots, which means that these two vessels were approaching each other at the rate of a mile in two-and-a-half minutes. In my opinion that was faulty navigation on the part of the master of the Hamburg-American boat, and I think that is really the initial cause of this collision. If he had taken proper precautions he undoubtedly would not have starboarded as he did. It was his starboarding which brought about the collision. I have had, therefore, two questions to determine with regard to this vessel. First of all, I think, from the contradictory

1911

THE PRESIDENT LINCOLN.

Bargrave Deane J.

story told as to where this light was, that there was a defective look-out on the Hamburg-American boat. Beyond that, I think that by not observing the provisions of the preliminary paragraph of art. 17 there was further neglect of duty on the part of the *President Lincoln*. On that account also she is to blame.

There is one other point which I have to deal with. I have already said that so far as the navigation of the *Tasso* is concerned I have no fault to find; but there is a question raised by the Hamburg-American boat, that the *Tasso* was carrying a defective red light; and they say that if they had seen that red light sooner it would have made a difference in their navigation. The first question I have to decide with regard to that is the distance at which these two vessels were seen one from the other. I think the master of the *President Lincoln* says that the white light was seen six miles away. If that were so, he would not then have had an opportunity of seeing the red light of the *Tasso*. At that time the red light would not be open to him, even if visible, because the green light would have been open until the *Tasso* ported. Therefore we have got to ask ourselves when it was that the *Tasso* got within two miles of the Hamburg-American boat, so as to open her side lights. I have great difficulty in finding when it was that the green light would change into red by the *Tasso* altering her course to starboard under her port helm. It may be, but I am not prepared to find it, that the green light was open before she ported, although it was never seen by the people on the Hamburg-American boat. They all agree that the green was a good light, because they saw it afterwards. Therefore I must leave out that part of the case, because I do not think it is clearly established that the green light was ever open and in view to the Hamburg-American boat; but undoubtedly the red light was open, and I have got to ask myself whether it was visible. If it was visible, and in view, of course the Hamburg-American boat ought to have seen it, and they did not until just before the collision, when I think they say the *Tasso* was only 100 feet away. The red lamp has been produced, and the evidence is very unsatisfactory about that red lamp. The red lamp produced has a short circular chimney, and no doubt it would have the effect of keeping the draught off the flame. The lamp so

1911

THE PRESIDENT LINCOLN.

Bargrave Deane J.

produced is said to be exactly like what the lamp was at the time of the accident, although the chimney itself was cracked and subsequently was taken out and a new chimney was put in. I do not think that it is by any means clear what sort of chimney was in this lamp at that time. There is a contradiction between the master and the people who trimmed the lamp. The master says the lamp was as it is now. The other people say "No! the chimney in the lamp then was a long chimney, with a bulb, elongated into a narrow chimney." The master says the only thing wrong with the lamp when it was opened was a little smoke round the rim at the top of the chimney. Undoubtedly the chimney at some time got cracked. It was taken out from the lamp after the accident, it was put by the second mate somewhere in the lamp locker, and subsequently it was thrown overboard in Dover Harbour by the man in charge of the lamps. It is very unfortunate that it was thrown overboard, because, except the master, the other men say it was not that sort of chimney at all which is now produced. Was it a proper chimney or a chimney which had been put in that day and did not suit the lamp, and which had begun to smoke and caused a good deal of smoke to get into the interior of the lamp apart from the chimney itself? It is said by those on the Hamburg-American boat who looked at the lamp that it was full of smoke inside the lamp, and that that obscured the light. It is unfortunate that the chimney was thrown away. It was known at the time that the question of the efficiency of the red lamp was being raised; and the Hamburg-American boat people bring a large body of evidence here to shew that complaint was made of the condition of the lamp, and that a man actually went on board the *Tasso*—the saloon steward, a man of experience—from the Hamburg-American boat, and looked at the lamp, and was satisfied that the light was obscured. I cannot reject all this evidence about the lamp being in this condition, and I have come to the conclusion in fact that for some reason or other—I cannot say why, whether it was that the chimney was not suited to the lamp and caused the smoke—but I am of opinion that the lamp was in a faulty condition at the time of the collision, and that blame attaches to those on the *Tasso* for navigating with the lamp in that condition. I accept

1911

THE PRESIDENT LINCOLN.

the evidence of the Hamburg-American boat that the lamp was not burning brightly.

In the result I hold that both vessels are to blame for this collision.

Solicitors for plaintiffs, the owners of the *Tasso*: *Thomas Cooper & Co.*

Solicitors for defendants, the owners of the *President Lincoln*: *Pritchard & Sons.*

T. L. M.

1911

July 21, 22, 24, 25.

THE RAGNHILD.

Admiralty—Ship—Collision—Steam Trawler "engaged in trawling"—Steamship crossing—Effect of Exhibition of Triplex Light—Giving way—Regulations for Preventing Collisions at Sea, 1897, *arts.* 9 (1906) (*d*) 1., 19, 21.

By art. 9 (*d*) 1. of the regulations for preventing collisions at sea, the exhibition of a triplex light is rendered compulsory on a steam vessel "engaged in trawling," and an intimation is thereby given to a crossing steam vessel that, as the trawler, by being incumbered, is unable to comply with art. 19 of the same regulations, and keep out of the way, the steam vessel must give way (*The Grovehurst*, [1910] P. 316), but that the trawler will, under art. 21, keep her course and speed.

Where, therefore, a steam trawler was (as the Court found) duly exhibiting the triplex light, and those in charge did not stop on seeing a crossing steam vessel causing imminent risk by suddenly porting when close to, and a collision occurred:—

Held by Bargrave Deane J., that the crossing steam vessel was alone to blame, for, in the circumstances, as a matter of seamanship, and, under the rules, as a matter of law, those in charge of the trawler were justified in keeping their course and speed.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the Great Northern Steamship Fishing Company, Limited, owners of the late steam trawler *Easington*, and her master and crew proceeding for their lost effects.

The defendants, and counter-claimants, were the owners of the Danish steamship *Ragnhild* and her freight.

The case raised the question as to the duty of a steam trawler to keep her course and speed, whilst indicating, by the exhibition

of a triplex light, that she is unable to keep out of the way, and involved the consideration of arts. 9 (*d*) 1., 19, and 21 of the regulations for preventing collisions at sea, 1897. (1)

The facts and arguments fully appear from the judgment.

1911. July 21, 22, 24. *Bateson, K.C.*, and *John B. Aspinall*, for the plaintiffs, the owners of the *Easington*.

Batten, K.C., and *C. Robertson Dunlop*, for the defendants, the owners of the *Ragnhild*.

In addition to the cases cited in the judgment, the following were referred to: *The Dunelm* (2), *The King's County* (3), and *The Cockatrice*. (4)

Cur. adv. vult.

July 25. BARGRAVE DEANE J. This is an action for damage brought by the owners of the steam trawler *Easington* against the owners of the steamship *Ragnhild*, a Danish steamer, which was on a voyage from Seaham to Kiel with a cargo of coal. The *Easington* was trawling in the North Sea, and was one of a fleet known as that of the Great Northern Steamship Fishing Company. She was, with another vessel, the *Erne*, the most westerly and to a certain extent away from the rest of the fleet. The collision took place at about half-past 5 in the morning of March 5 in this year. It was dark but clear, and there was some wind and sea; and the two vessels came together with such violence and with such serious effect that the *Easington* sank. Fortunately her crew were able to get into their boat and get on board the *Erne*, and no life was lost.

(1) Art. 9 (May 1, 1906):

"(*d*) Vessels, when engaged in trawling, by which is meant the dragging of an apparatus along the bottom of the sea—

"1. If steam vessels, shall carry . . . . a tricoloured lantern so constructed and fixed as to show a white light . . . . a green light and a red light . . . ."

Art. 19: "When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

Art. 21: "Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed . . . ."

(2) (1884) 9 P. D. 164.

(3) (1904) 20 Times L. R. 202.

(4) [1908] P. 182.

1911

THE RAGNHILD.

Bargrave Deane J.

Now, the first question in the case is one of fact. Was the *Easington* exhibiting her proper fishing lights? Was she carrying an all-round globe white light, a triplex light, such as is prescribed for fishermen to carry, and a stern light? On the one side I have the evidence of those on the *Easington* herself, who swear that the lights were duly exhibited and burning before and at the time of the collision, and I have the evidence of the same people and from the *Erne* that after the collision those lights were still seen to be burning. It is a question of the credibility of witnesses. No fewer than ten men swear to the fact that these lights were burning properly before and at the time of the collision. On the other hand, the whole case of the *Ragnhild* is that the *Easington* was not exhibiting proper fishing lights. It is said that she was exhibiting only a white light, I suppose meaning a globe all-round light. That is sworn to by the second officer of the *Ragnhild*, who was in charge, and in a certain sense it is deposed to by the master of the *Ragnhild*, who was in his cabin at the time of the collision, and who said that he looked out of his cabin window and only saw one white light, and that he never did see, after the collision, anything but a white light on the vessel with which he had collided. I do not think his evidence is conclusive, even if it is accepted. In regard to the second officer, if his story is absolutely to be depended upon, this trawler was not carrying the proper regulation light. Therefore it is a question of fact, of the credibility of witnesses —am I satisfied or not that the trawler was carrying proper lights? On the one side, as I have said, there are ten witnesses; on the other side only one, and it is perfectly clear that the second officer of the *Ragnhild* did not conduct the navigation of his ship in a seamanlike way. He altered his helm twice without blowing any signal. He had a man on the look-out, by his side, apparently, on the bridge—it is said that the weather was such that it was not fit to be on the forecastle head—but as far as I can understand there was no report of this vessel; and the misfortune is that I am told that both the man at the wheel and the man who had been on the look-out have deserted and cannot be brought here as witnesses. It is unfortunate, and I am very sorry that is so, but I have to act upon the evidence which is

put before me, and the conclusion I have arrived at is that the trawler's lights were properly exhibited and burning. In addition to the evidence I have got to look at the probabilities. Here is a fleet of vessels. It is essential for their own safety, one from another, that they should be carrying proper lights. It is highly improbable that they would not be exhibiting the proper lights. The argument put forward is that it is quite likely they did not trim their lights, but allowed them to go out, and so on. I do not think it is probable. Of course it is possible—we know what these fishermen are—they are excellent seamen, but no doubt rough and ready in their ways—but still the conclusion I have come to is that the lights were burning.

If the lights were burning the evidence of the second officer of the *Ragnhild* is not of much value. On the other hand I have to look at what he actually deposed to. He says that when he saw a white light and a green light he starboarded. That is the same story as that told by the *Easington*, that on their starboard bow they saw this steamer, shewing her red light, and that she opened her green light, shewing she was starboarding. The second officer said that having starboarded, and got green to green, he then saw a white light, and that as he appeared to be running into that white light he ported. That corroborates the story of the *Easington* that the vessel having starboarded and become green to green then ported and ran into them. I cannot help thinking that the second officer, having got among these fishing vessels, did not know where he was or what he ought to do, and that in the hurry of the moment he starboarded and then ported. It was simply a matter of bad seamanship. If that is the case, of course his vessel must be held to blame.

It is suggested by counsel for the defendants, however, that the case is not concluded by that finding: that here was a trawler which, though it is true she was hampered by having her trawl down, was bound—I do not think he goes so far as to say to keep out of the way—to stop as soon as she saw that a collision was imminent. The word "imminent" is very awkward. It does not mean when there is possible risk of collision; it means when by doing something you can avoid it or can hope to avoid

1911

THE RAGNHILD.

Bargrave Deane J.

it. In this case the *Easington* kept her course and speed—she did not stop—her engines were going ahead at the time of the collision. She was struck right aft on the starboard side—both parties agree about that—and the angle was a fine angle, leading aft.

Now, the Elder Brethren have gone into this question of stopping, and first of all I will deal with it from the seamanship point of view. Those on the trawler see on their starboard bow a vessel shewing a red light. The vessel starboards, which brings her green to green, a perfectly safe course, and so they continue, green to green, until just before the collision, when suddenly the vessel ports and opens her red light again. A vessel which adopts that sort of manœuvre is a very difficult vessel to deal with, and I am advised, and I agree with the advice, that in this particular case there is no reason to say that for the non-stopping of her engines when that second alteration of the *Ragnhild's* helm took place, namely, the porting, immediately before the collision, any fault is to be found with the seamanship of the *Easington*.

I go a step further, although I need not do so, because if from the seamanship point of view the trawler is not to blame for not stopping her engines, then it decides the question; but I go a step further than the case of *The Grovehurst* (1), which was a somewhat similar case to this. In that case, at the last moment, when the collision was practically inevitable, the trawler did stop her engines, just as the blow was struck. My opinion of the law as to this is based upon the decision in *The Grovehurst*. (1) I agree that as soon as the rules of navigation were altered, making it absolutely incumbent upon a trawler with her trawl down to carry a triplex light, there was some object in altering the law. What was the object? The Court of Appeal, in dealing with *The Grovehurst* (1), were unanimous that the alteration in the law was this, that the trawler was put into the position of an unnavigable vessel, of which any vessel approaching, whether steamer or sailing vessel, had to keep out of the way. It followed from the decision that if that duty is incumbent upon the approaching vessel to keep out of the way, it is necessary

(1) [1910] P. 316, at p. 329.

that the trawler should do nothing but keep her course and speed under art. 21. The Court of Appeal practically said that in *The Grovehurst*. (1) Vaughan Williams L.J. says this: "In the case of *The Tweedsdale* (2)—decided at a time when the exhibition of the triplex light was discretionary—it was held that a steam trawler, going slowly with a triplex light exhibited, had no duty to get out of the way of a sailing ship, the incapacity of the trawler to manœuvre, and her triplex light, throwing the duty on other vessels to keep out of the way of the trawler. This decision seems to me to be common sense, and in my opinion applies a fortiori now that the duty of exhibiting the triplex light is absolute." It stands to reason from the seamanship point of view that if you are conducting the operations of the steamer or the sailing vessel and you see an object in your way exhibiting a light which indicates to you that she cannot get out of your way, then the whole duty is on you to keep out of her way and the whole duty on her is to do nothing, except, perhaps, if anything can be done at the last moment to prevent the collision being brought about. I think art. 21 becomes plain directly you find that this new art. 9, which was made law in 1906, becomes operative. Under art. 9 here is a vessel which has to keep out of the way of the other, and under art. 21 the other vessel must keep her course and speed; and I think that if she were to stop at a time when the other vessel was going to clear, and a collision happened, she would be held to blame. You hamper the movements of a vessel which has to keep out of the way if you do not keep some regular system of movement which the other vessel can see and appreciate and act to avoid.

In my view, therefore, it follows as a natural course that where the duty is imposed upon one vessel to keep out of the way, it is the duty of the other vessel to keep her course and speed. Buckley L.J. takes the same view. In *The Grovehurst* (3) he says: "A statutory obligation imposed upon trawlers, engaged in trawling, to have special lights must have been, as it seems to me, imposed for some purpose, and the purpose must have been to acquaint other vessels that the vessel is a trawler engaged in

(1) [1910] P. 316, at p. 329. (2) (1889) 14 P. D. 164.
(3) [1910] P. 316, at p. 333.

1911

THE RAGNHILD.

Bargrave Deane J.

trawling, and therefore incumbered by her gear. Presumably the object of giving that information was that other vessels might know that in some way she stood in an exceptional position. If that exceptional position was that she was relieved from some duty, which otherwise she would owe, the provision becomes intelligible; but, if not, I do not know what could have been the purpose." Then the President of this Division (Sir S. T. Evans), who was the third judge, comes to the same conclusion. He says (1): "It would seem to be entirely in the interest not only of the fishing community, but also of all those who navigate waters where the fishing business is carried on, that there should be no uncertainty as to the course to be pursued, arising from a want of knowledge of the manœuvring facilities of a trawler, and that, where fishing lights are carried by a trawler, crossing steamers not incumbered should know that the incumbered vessel is there and is incumbered, and that they should direct their operations accordingly." That, of course, means that they cannot direct their operations unless they know what the other vessel is doing, and if it is understood that the other vessel is to do nothing, then they are not incumbered in their navigation in having to deal with her; whereas if the other vessel altered her helm or speed and moved about in all sorts of directions, perhaps trying to go astern, it is obvious she would incumber the vessel which had to keep out of her way. The only rational course is to say that one vessel shall keep her course and speed, and the other vessel shall keep out of the way. In my opinion, in this case the trawler is not to blame for her manœuvring, or rather for her not manœuvring, and the whole cause of this collision was faulty look-out on the *Ragnhild*, and she is alone to blame.

Solicitors for plaintiffs, the owners of the *Easington*: *Pritchard & Sons, for Andrew M. Jackson & Co., Hull.*

Solicitors for defendants, the owners of the *Ragnhild*: *Stokes & Stokes.*

(1) [1910] P. 316, at p. 338.

T. L. M.

[IN THE COURT OF APPEAL.]

C. A.
1911
June 20, 21.

THE HIGHLAND LOCH.

Admiralty—Ship—Collision—Launch—Duty of Vessel anchored in Track of Launch—Risk of postponing Launch.

The defendants, owners of a shipbuilding yard on the Mersey, being about to launch a vessel, gave the usual notices, and arranged with the owners of some moorings nearly opposite to pay half the cost of removing the buoy marking their position. The plaintiffs' ketch, which was coming up the river on the morning of the intended launch, finding the wind falling light, and with a view to bringing up, let her anchor drag, and, fouling the moorings, the vessel remained fast. Messages were sent by the defendants to the master of the ketch to move her, and, finally, a tug, whilst offering to tow the ketch away, delivered a letter advising her master to slip, and stating that the defendants would not be responsible for any damage to the ketch or for any accident to any person on board. The master of the ketch, however, thinking his vessel was out of the zone of danger, refused to slip without an undertaking from the defendants that they would be answerable for the cost of the anchor if lost. The defendants, not deeming it prudent to incur the risk of further delay, launched the vessel, which struck the ketch. In an action of damage by collision, brought by the owners of the ketch, the President found that the master of the ketch had no right to make it a condition before moving that the defendants should give an undertaking to replace the anchor, and that he was at fault for not slipping his chain and removing to a place of safety, but that the defendants were alone to blame as they had, for their own purposes, and to the plaintiffs' injury, launched the vessel without regard to the possible consequences to the plaintiffs' ketch and her crew. The plaintiffs' negligence, therefore, did not excuse the defendants, because they might, by the exercise of care, have avoided the mischief which their deliberate action caused:—

Held by the Court of Appeal (Vaughan Williams, Fletcher Moulton, and Buckley L.JJ.), reversing the decision of the President, that the plaintiffs' ketch was alone to blame, for the defendants reasonably chose that which they believed to be the lesser of two evils, and risked the slight chance of injuring the ketch in order to avoid the serious risk to life and property which would result from postponing the launch.

Appeal by defendants, owners of the *Highland Loch*, against a decision of the President (Sir Samuel Evans) finding them alone to blame for the damage occasioned by a collision between their vessel, whilst being launched, and the ketch *Frances* owned by the respondents (plaintiffs).

C. A. 1911

THE HIGHLAND LOCH.

By their statement of claim the plaintiffs, the owners of the ketch *Frances*, alleged that:—

Par. 2. "Shortly before 12.45 P.M. on January 17, 1911, the *Frances* a ketch of 71 tons register of Padstow whilst bound from Pentewan to Runcorn with a cargo of china clay and manned by a crew of four hands was at anchor in the Mersey to the northward and eastward of the defendants' shipyard. The weather was a little hazy the wind calm and the tide flood. A good look-out was being kept on board the *Frances*. Her anchor was foul of some ground moorings and the crew were doing their best to get the anchor clear in order to shift their berth but were not succeeding although assisted by a tug sent by the defendants."

Par. 3. "In these circumstances the defendants or their servants launched the *Highland Loch* and did so in such a way that she came out into the river at high speed stern first and her stern sheered in the down river direction, and with her stern and propeller she struck the *Frances* on the port side doing considerable damage."

Par. 4. "The defendants or their servants were negligent—

"(1.) In launching the *Highland Loch* at a time when or in a manner which they knew or ought to have known would endanger the *Frances* and the lives of those on board of her;

"(2.) In not keeping the *Highland Loch* clear of the *Frances* or taking proper precautions or measures to do so."

By their defence and counter-claim the defendants, owners of the *Highland Loch*, alleged that:—

Par. 3. "The *Highland Loch* a screw steamship of 4675 tons register was built in the Tranmere yard of Cammell Laird & Co. Limited, on the river Mersey and her launch was arranged to take place at 12.30 P.M. on January 17, 1911. This date had been fixed for several days and the defendants had given all the usual and necessary notices thereof. The launch and also the tugs *East Cock* and *South Cock* which were in attendance were dressed with flags and two boats were stationed in the river one on each side of the launch ways each carrying a red flag and a red flag was flying from the pier head at defendants' Tranmere Bay yard."

C. A. 1911

THE HIGHLAND LOCH.

Par. 4. "In these circumstances the ketch *Frances* was seen at about 11 A.M. on the morning of January 17, 1911, to come to a position in the river nearly opposite the launch ways and about from 500 to 600 yards out from them where she lay with her anchor down. A message was at once sent out to her by the dock master to tell those on board that there was going to be a launch and that the *Frances* should move out of the way. The master of the *Frances* told the messenger that his anchor was foul of some moorings and he was then advised to slip his chain or knock a pin out of the shackle, attach a rope to it and buoy the anchor but he refused to do anything. About 11.30 A.M. another message was sent out to her by the tug *East Cock* to warn her master that he must move away as his position was an unsafe one on account of the impending launch. The *Frances* however did not move, her master alleging that he could not lift his anchor. Shortly after 12 noon the tug again went out to the *Frances* carrying a messenger with a third message of warning and the master of the ketch was then urged to slip his cable and let his vessel be towed by the *East Cock* out of the way, but the master refused to slip his cable. The tug then got hold of a rope from the *Frances* and pulled her to the northward over her anchor in order to see if the anchor could be got in by that means but this attempt to get the anchor in was unsuccessful. At 12.40 P.M. a warning signal gun was fired from the shore indicating that the launch was to take place in about five minutes and as the master of the ketch still persisted in his refusal to slip his cable (which if slipped could have been buoyed so as to be easily picked up again) the tug being unable to do anything further for the safety of the ketch returned to the launch. At 12.45 P.M. it being then considerably past the time appointed for the launch which could not with safety to life and property be further delayed the *Highland Loch* was let go from the ways. Immediately she took the water her anchor was let go but before it held her an ebb current which was running near the shore took effect upon the stern of the *Highland Loch* causing her to take a sheer more to the northward towards the place where the *Frances* lay and the port quarter of the launch struck the ketch a glancing blow on the latter's port side."

C. A. 1911

THE HIGHLAND LOCH.

Par. 5. "Those in charge of the *Frances* knew or had full notice and means of knowing of the intended launch and that it could not with safety be postponed and they had ample time to move the ketch or cause or suffer her to be moved out of the way but they neglected and refused to do so."

Par. 6. "Those on board the *Frances* improperly neglected to move her out of the way and improperly refused to take the assistance offered by the *East Cock*."

Par. 7. "Those on board the *Frances* improperly neglected and refused to slip the anchor chain so as to enable the ketch to be moved to a position of safety and they neglected to run out more cable or take any steps which would enable the *East Cock* to tow her into a position of safety."

Par. 8. "The collision and the damage consequent thereon were solely caused by some or all of the matters and things stated in the 4th 5th 6th and 7th paragraphs hereof or otherwise by the negligence of the plaintiffs or those on board the *Frances* and were not caused or contributed to by the defendants or by the *Highland Loch* or those on board of her."

By way of counter-claim the defendants repeated paragraphs 3 to 8 and said that they had suffered damage by the collision.

The case was tried on May 11 and 12, 1911, by the President (Sir Samuel Evans), assisted by two of the Elder Brethren of the Trinity House.

According to the evidence the *Frances* arrived in the Mersey on the morning of January 17, and sailed up the river on the flood tide until, at about 10 o'clock, she was opposite Prince's Dock, but on the Cheshire side, when, not knowing that any launch was going to take place, and the wind having fallen light, the starboard anchor was let go and dragged up river until brought to a standstill by some moorings of the Cunard Steamship Company, from which the buoy had been removed, on account of the proposed launch, by arrangement with the defendants, who paid half the cost. The *Frances* had fifteen fathoms of chain out in ten fathoms of water, and was moved by the tug about a couple of fathoms, and then fell back into the same position as before. The master of the *Frances*, when advised to slip his anchor, said he "would do it provided they

(the defendants) would take the vessel away in safety and be answerable for a new anchor." The further details as to the conversations with the servants of the defendants, and the contents of the letter addressed to the master of the *Frances* by the defendants, fully appear from the following judgment, in which all the cases cited by counsel in argument are mentioned except *Whalley* v. *Lancashire and Yorkshire Ry. Co.* (1), referred to on behalf of the plaintiffs, and *The City of Lynn* (2), referred to on behalf of the defendants.

1911. May 18. THE PRESIDENT (SIR SAMUEL EVANS). The plaintiffs' ketch, the *Frances*, was damaged by the launching of the defendants' vessel, the *Highland Loch*, in the river Mersey, about, or shortly after, 12.45 P.M. on January 17 last.

The ketch's anchor had dragged, and got foul of some moorings in the river in the vicinity of the slip from which the launch was to take place.

All proper notices of the intended launching were given, and particular warning was given to the *Frances*. The launching was timed for about 12.30 P.M. About 10.30 the defendants sent a message to the master of the *Frances* by a boatman that there was going to be a launch, and that he (the master) was to get his vessel out of the way.

About 11.30 another message was sent by one of the tugs in attendance at the launch, to a similar effect, and the master was told he must slip his anchor.

Shortly before 12.30, one Lang, the assistant yardman of the defendants, went out in the same tug, and took with him a letter from the defendants' manager to the master, which was as follows:—

"Tranmere Shipyard, January 17, 1911,—To the Captain, schooner *Frances* of Padstow.

"Dear Sir,—We observe that you are in the line of the launch of our steamship *Highland Loch*, and as all preparations are made we must launch the ship at 12.30 to-day, we cannot be responsible for any damage done thereby to your ship and would advise you to slip your anchor and clear away at once. Yours truly,

(1) (1884) 13 Q. B. D. 131. (2) (1882) 11 Fed. Rep. 339.

1911

THE HIGHLAND LOCH.

The President.

Cammell, Laird & Co. Ltd., W. Boyd, Manager. P.S. We also cannot be responsible for any accident to any person on board your ship. C. L. & Co. W. B."

Lang delivered this letter to the master, who shewed reluctance in accepting it, and he did not in fact open it until after the collision. Lang, however, told him that the launch was coming off, and he must get out of the way; and tried to persuade him to slip his cable.

The attitude taken by the master was in substance this: I cannot heave my anchor, and will not slip my cable, unless you will pay, or be answerable for it, or for a new anchor, and take my ketch away in safety.

The answer of Lang, in substance, was: I have nothing to do with paying for an anchor, and I have no authority to become answerable for it; but, if you will slip your cable, I will tow you away to a place of safety.

At the request of the master of the ketch, the tug made fast in order to draw her up to her anchor, and tried to heave her anchor, or to get her clear in that way.

Meantime Lang sent a boatman on shore to report the position.

The tug did not succeed in heaving the anchor, and the ketch was only moved a very short distance, and was not in fact cleared out of the way of the launch.

The boatman reported to the defendants' manager that the master would not slip his anchor, but that the tug was going to tow him as far to the north as possible, in order to try to get him clear.

It had been arranged between Lang and the defendants' manager that, if the master was going to slip his anchor, Lang would blow a signal of three blasts from the tug, and then the manager would delay the launch for about fifteen minutes. No signal was blown. When the message above referred to was given to the manager, he immediately ordered the defendants' steamer to be launched, having (as he said) considered beforehand what to do if the master would not slip the anchor. The launch had been delayed about a quarter of an hour.

When the first gun was fired Lang was still on the ketch, to

1911

THE HIGHLAND LOCH.

The President.

which the tug was made fast. On hearing the gun he went on the tug and ordered the tug to throw over the ketch's rope. The tug then steamed away. The ketch would soon regain her first position, from which the tug had moved her only a few yards. A second gun was fired and the launch was made.

The master hoped and expected that his ketch was in a safe position.

The defendants' manager, however, had written that it was in the line of the launch, and he ordered the launching to take place, without heeding the consequences to the ketch, or to any person on board of her.

The launched vessel collided with the ketch and caused the damage to recover which the action is brought. The plaintiffs allege, in these circumstances, that the *Highland Loch* was launched at a time when, or in a manner which, the defendants knew would endanger the *Frances* and the lives of those on board.

The defendants plead in answer that the master of the ketch refused to slip the anchor and to get out of the way, and that the launching could not with safety be postponed.

The steamer could not go into the water till the hydraulic stop-way was removed. It was not proved to my satisfaction that apart from inconvenience, and possible cost, there was any danger in postponing the launch.

The question is, who in these circumstances is responsible for the collision?

The obligations of those who cause a launch to be made, and of those who navigate the river in the vicinity at the time, have been discussed in various cases.

They are *The Blenheim* (1); *The Vianna* (2); *The United States* (3); *The Glengarry* (4); *The Andalusian* (5); *The Cachapool* (6); *The George Roper*. (7)

If proper notice is given, vessels navigating the river, or anchored in it, must take all reasonable precautions to avoid a collision.

(1) (1846) 4 No. Ca. 393.
(2) (1858) Swa. 405.
(3) 1865) 12 L. T. (N.S.) 33.
(4) (1874) 2 P. D. 235.
(5) (1877) 2 P. D. 231.
(6) (1881) 7 P. D. 217.
(7) (1883) 8 P. D. 119.

1911

THE HIGHLAND LOCH.

The President.

On the other hand, those intending to launch a vessel must take precautions—and "the utmost precautions"—against any injury being caused by the launch; and the burden of shewing that such precautions have been taken lies upon those managing the launch.

These precautions are necessary, not merely to safeguard property, but to protect lives which may be in danger. For this purpose, amongst other things, there is a duty upon those about to launch a vessel to keep a good look-out, and, before giving the final order for launching, to ascertain that no ship is passing, or lying near, so as to be endangered by the launch. See *The Blenheim* (1) and *The Vianna.* (2)

As to the two vessels which collided, I am of opinion that the master of the *Frances* was at fault in not slipping and buoying his anchor, and dropping, or being towed to a place of safety. He had no right to make it a condition, before taking the proper steps which good navigation required him to take in order to perform his obligation, that the anchor should be paid for, or that an undertaking should be given to pay for it, or to replace it. The question is, not whether his conduct in making the demand in the interest of his owner was reasonable conduct in a servant; but whether he took reasonable steps in navigation to avoid danger.

As to the defendants, they were, in my opinion, at fault also, in ordering the *Highland Loch* to be launched, knowing the danger to the *Frances*, and to those on board, and in deliberately disregarding such a danger. If those managing a launch are to blame for not keeping a good look-out, and for not ascertaining, as well as circumstances permit, before the final order to launch is given, that no ship is within a dangerous zone, they are still more to blame, if, having kept a look-out, and knowing of the proximity of a vessel in danger, they launch a steamer which will not only probably, but almost certainly, cause loss of life, or injury to property.

The question remains, whether the liability for the injury attaches to both, or to one only of these two vessels which have been negligently managed?

(1) 4 No. Ca. 393. (2) Swa. 405.

In some of the cases cited both the vessels were held to blame, and in others one only. In *The Cachapool* (1) the steamer at anchor in the river was held alone to blame. That case must be looked at in the light of the particular facts. The steamer there was, although late, being towed away, and there is nothing to shew that the launch was ordered with the anticipation, or expectation, of danger, and with the threat that those managing it would not be responsible for loss of life, or injury to property. Moreover, the Court held that the launch was "delayed as long as it was prudent to do so." I am not sure whether that phrase was intended to convey that the Court was satisfied that "the launch could not with safety to life and property be further delayed," as pleaded in the defence.

In the present case, there was some slight evidence that "it would not have been safe to postpone the launch altogether," but it fell far short of establishing the plea of danger to life and property; and, indeed, the defendants' counsel did not contend that the plea had been established, or rely upon it as a defence.

The case of *Davies* v. *Mann* (2) was cited in argument in *The Cachapool* (1), but it was not dealt with in the judgment. That is, perhaps, the most familiar of the cases which illustrate the doctrine that was further established in the later cases of *Tuff* v. *Warman* (3) and *Radley* v. *London and North Western Ry. Co.* (4)

Tuff v. *Warman* (3) was a case of collision between two vessels, although it was an action at common law, and it is now well established that the doctrine laid down in the three last-named cases applies to actions for collision brought in the Admiralty Division, where the facts call for its application. The following passage in the address of Lord Penzance to the House of Lords in *Radley* v. *London and North Western Ry. Co.* (5) has constantly been referred to as a clear statement of the doctrine: "The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or

(1) 7 P. D. 217.
(2) (1842) 10 M. & W. 546.
(3) (1858) 5 C. B. (N.S.) 573.
(4) (1876) 1 App. Cas. 754.
(5) Ibid. at p. 759.

1911

THE HIGHLAND LOCH.

The President.

want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first—namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."

It is no doubt inconvenient, and may be productive of monetary loss, if, by the negligent or unreasonable action of those in charge of a vessel in a river near a launching place, a launch is postponed. Fortunately, by the reasonable management of navigating vessels, such postponements are hardly ever caused. If any action of such an unreasonable kind is anticipated, the harbour and dock authorities have generally full powers to cause the removal of the offending vessel.

But I conceive it would be no answer to the plaintiffs' claim in *Davies* v. *Mann* (1) if it were shewn that the defendant was hurrying to catch a particular train, and that he would be a great loser monetarily if he lost it, or to the plaintiffs' right to recover in *Tuff* v. *Warman* (2), if it were proved that the defendants' vessel was making haste to reach a particular dock in order to enter on a particular tide.

In the present case, the defendants, for their own purposes, determined to launch at the particular tide, whatever the consequences might be to the plaintiffs' vessel and her crew. They did so to the plaintiffs' injury.

This being so, the plaintiffs' negligence does not excuse the defendants, because they could, by the exercise of care, have avoided the mischief which their deliberate action caused.

I therefore pronounce the defendants solely to blame.

1911. June 20. *Laing, K.C.*, and *G. D. Keogh*, for the appellants (defendants), the owners of the *Highland Loch*. The defendants gave all the necessary notices of the intended launch some days beforehand, and specially warned the master of the plaintiffs' vessel as soon as it was seen that he had anchored in a

(1) 10 M. & W. 546. (2) 5 C. B. (N.S.) 573.

position which might possibly prove dangerous to the ketch, though she was really not in danger, and would not have been hit but for the delay caused by the unreasonable conduct of her master, as the ebb tide had, in the meantime, begun to run inshore, and so caused the launch to swing round.

The master of the ketch had no right, after notice, to block the fairway, and impose conditions as a preliminary to slipping his chain. It was his duty to at once remove his vessel to a place of safety. Further delay was out of the question, for, there being nothing left to hold the vessel but the hydraulic stop, she might launch herself at any moment, involving serious risk not only to property but to the lives of the workmen in the yard and others concerned in the launch. The evidence on this point was very strong, but this important part of the defendants' case does not seem to have been quite realized by the learned President. The manager of the defendants' yard was placed in a serious position by the obstinacy of the master of the ketch and had to do the best he could in the circumstances, and there was no negligence on his part in deciding to run the very slight risk of injury to the ketch, and avoid the very serious risk to life and property which would result from any attempt to still further postpone the launch. [Reference was made to *The Margaret* (1); *Davies* v. *Mann* (2); *The Cachapool* (3); *The City of Lynn* (4); *The United States* (5); *Grand Trunk Railway of Canada* v. *Barnett* (6); *Dimes* v. *Petley* (7); *Petrie* v. *Rostrevor*. (8)]

Bailhache, K.C., A. D. Bateson, K.C., and *C. Robertson Dunlop,* for the respondents (plaintiffs), the owners of the *Frances*. The plaintiffs' ketch came up the river not knowing anything about the intended launch. The Cunard Company, at the request of the defendants, and on condition that they paid half the cost, had removed the buoy marking their moorings in order not to obstruct the launch; but all the trouble would have been saved if the moorings had been marked, for the absence of the buoy

(1) (1884) 9 App. Cas. 873.
(2) 10 M. & W. 546.
(3) 7 P. D. 217.
(4) 11 Fed. Rep. 339.
(5) 12 L. T. (N.S.) 33.
(6) [1911] A. C. 361.
(7) (1850) 15 Q. B. 276.
(8) [1898] 2 I. R. Q. B. 556.

C. A. 1911

THE HIGHLAND LOCH.

constituted a trap into which the master of the plaintiffs' ketch fell through no fault of his, and, in the end, the master of the ketch would have slipped his chain in time, if his message had been delivered to the defendants, and they had undertaken to pay for his anchor if lost. In fact the launch took place in entire disregard of the risk to the plaintiffs' ketch. [Reference was made to *The Cachapool* (1) and to *Whalley* v. *Lancashire and Yorkshire Ry. Co.* (2)]

Laing, K.C., in reply. If the absence of the buoy marking the Cunard Company's moorings can be said to be a trap, the defendants sent their tug and offered to pull the ketch out of it by towing her away.

VAUGHAN WILLIAMS L.J. This case raises the question, under what circumstances those who have charge of the launching of a ship can safely take the risk of damage to life or property in case the launched ship should collide with a vessel lying in the river where the launch is to take place, and also the question how far the unreasonable refusal of the master of such a ship at anchor in the river to slip his anchor and go out of danger would be an answer to an action by which the ship unreasonably refusing to move claimed to recover the damage occasioned by a collision resulting from the launch.

We have asked our assessors the following question, and received the following answer: "What was the reasonable course for (*a*) the master of the ketch, and (*b*) the owners of the launch to take when 12.30, the hour fixed for the launch, arrived?—(*a*) That he would slip his cable, provided the tug kept hold of him, towed him to a place of safety, and brought him back to his cable; (*b*) to suggest to the ketch the above course, and give him the opportunity of acting upon it, when they knew the launch must take place."

Before dealing in detail with the facts and the findings of the learned judge in relation thereto, I will make some observations as to the principles of law governing this case. It is clear law that in the course of using a highway, whether by water or land, the mere fact that one of the persons using the

(1) 7 P. D. 217. (2) 13 Q. B. D. 131.

highway negligently, unreasonably, or wrongfully obstructs the way, will not exonerate another person who is using the highway from the duty to take care to avoid injuring the obstructor; and, a fortiori, will not justify the infliction of wilful injury: see *Davies* v. *Mann*. (1) In each of the cases of wrongful or unreasonable conduct which I have indicated, the wrongful conduct of those obstructing the highway still leaves unimpaired the duty on the person obstructed to take care not to injure the obstructor. Parke B., after thus stating the law, said (2): "Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road." This duty may, of course, be limited by the force of surrounding circumstances. It might be that the avoidance of injury to the obstructor or his property would involve risk of injury to an innocent third person using the same highway, and in such a case the obstructed person might reasonably, even deliberately, run against the obstructor of the highway, or his property, and yet have a good defence to an action brought by the obstructor for injury done to his person or property. In the case of *The Cachapool* (3), a case very like the present in its circumstances, the head-note runs thus: "A barque was at anchor in the Mersey in the way of the *C.*, a vessel about to be launched. The launch was delayed as long as was prudent, but the barque not having been got out of the way in time was struck by the *C.* in coming off the ways and both vessels were damaged. Reasonable notice had been given of the launch, and a steam tug had been sent by those superintending the launch to tow the barque out of danger, and would have done so in time to have prevented the collision but for the obstinacy of those on board the barque. Held, that the barque was alone to blame for the collision." The case of *Davies* v. *Mann* (1) was not cited in the judgment, but Sir R. Phillimore says (4): "A question which has been much considered by the Court is whether, even after the *Gladstone* was taken hold of by the tug at half-past nine or a quarter to ten o'clock, those on

(1) 10 M. & W. 546.
(2) Ibid. at p. 549.
(3) 7 P. D. 217.
(4) Ibid. at p. 224.

C. A. 1911

THE HIGHLAND LOCH.

Vaughan Williams L.J.

board the *Gladstone* did anything which contributed to the collision, or neglected to do anything which would have prevented it. The Elder Brethren are of opinion that if the *Hercules*, in the first instance, instead of giving the warnings she did, had taken the *Gladstone* in tow, the result would have been different, and also that if those in charge of the *Gladstone* had not been obstinate and had allowed the *Hercules* to take their vessel to the north-east, the launch would have gone clear." Those words might be read as meaning that the fact that the *Gladstone* in that case had been guilty of unreasonable conduct alone constituted a defence to any action brought by the *Gladstone* for damage which was incurred by the launch being sent forth into the water as it was. I do not think that Sir R. Phillimore meant to say that the mere fact of unreasonable obstinacy on the part of the ship run down—the *Gladstone*—would constitute a defence if the running down of the *Gladstone* might have been avoided, and still less if the risk of running down the *Gladstone* was deliberately taken by the owners of the *Cachapool*, the ship which ran down the *Gladstone*. The facts alleged in the 4th and 5th of the defendants' pleas, if proved, would shew that those in charge of the launch could reasonably suppose that there was no risk. If they did so reasonably suppose, then I agree entirely with the judgment of Sir R. Phillimore.

The questions, therefore, in this case, on the evidence, will be: (1.) Did the defendants reasonably suppose that there was no risk? (2.) Did they reasonably choose to launch the *Highland Loch*, rather than to postpone the launch, as being the lesser of two evils, one of which had to be taken in the presence of a real dilemma? Before calling attention to the judgment of the President as a whole it will be convenient to turn to that particular part of it which deals with these questions. The President says: "The master hoped and expected that his ketch was in a safe position."—That is the finding of the President, and in my judgment it is entirely justified by the evidence.—"The defendants' manager, however, had written that it was in the line of the launch, and he ordered the launching to take place, without heeding the consequences to the ketch, or to any person on board of her. The launched vessel collided with the ketch, and

caused the damage, to recover which the action is brought." At this point I might refer to the letter of January 17, 1911, which was written on behalf of the defendants, and which is set out in the judgment of the President. It is rather difficult, in the face of that letter, to avoid the conclusion of the President that those who were conducting the launch were conscious of a real risk to property and person. I do not suppose that any one would contend that the mere possibility of an accident in the course of the launch would be sufficient to prevent those in charge of the launch saying, "We acted quite reasonably in launching our ship. It is quite true that there was a possibility of an accident, but so slight a possibility that it was a negligible fact, and a fact that reasonable persons could neglect"; but I think it would be rather difficult to say that in the face of this letter. On the other hand, it has been suggested that the letter does not indicate the state of mind of the writer, but only indicates the fact that he wanted to bring pressure to bear; that he might perfectly well have written that letter although he agreed with what the master of the ketch subsequently stated, namely, that he was quite safe. If that was so he was acting in full accordance with the principle of law laid down by the judgment of Parke B. in *Davies* v. *Mann* (1); and if that was so the judgment would be wrong which held the defendants here to be solely to blame, or indeed to be to blame at all.

Again, another point is made here. It is said that even if there were strong grounds present to the minds of those who were in charge of the launch for supposing that there was great risk of collision with the ketch, yet they might reasonably proceed with the launch, because if they did not launch it might be the cause of very great danger to persons other than the master and crew of the ketch; for there would be danger, if it was attempted to put back the blocks, to the men who were engaged in so doing, and danger also, if the blocks were not put back, that the ship might of itself—I think the expression used is—glide down the ways and be launched. It is said that that would be a danger to people using the river, because such a launch at an uncertain time would come unexpectedly upon those using the river. I

(1) 10 M. & W. 546.

C. A. 1911

THE HIGHLAND LOCH.

Vaughan Williams L.J.

confess myself that I do not think, on the face of the evidence, that this was such a pressing danger as to justify this choice of the lesser evil and refusing to postpone the launch; but I am told that it is not open to the Court to say that because of a conversation which took place between the leading counsel for the defendants and the President in the course of the case. Counsel for the defendants was pressing a witness to admit that there would be a very serious danger of the sort I have described if the launch were postponed. He asked the witness—the manager who wrote the letter—this question: "I want to ask you about the danger, if any, of postponing the launch. Supposing you had not launched her that tide at all, what would have had to have been the course adopted by you, about giving notices, and the danger there may have been, if any, to your people?" and the witness replied: "Well, we would have had to have renewed the notices." Thereupon the President said: "With as much difficulty as there was, Mr. Laing, I do not think it was reasonable to ask these people to postpone the launch till the next tide." I agree, if I may say so, with the learned President. The learned President there, as he did in his judgment, is taking exactly the same view as is indicated in the answer given to the question put by the learned counsel. Then this occurs:—

"Mr. Laing: The object of my question was to meet an observation your Lordship made yesterday as to whether there was any possible risk to their own people by keeping the launch suspended without some proper supports.

"The President: Yes, you asked him about the next tide. His waiting another quarter of an hour or twenty minutes is another matter. I do not think it was reasonable to ask these people, in the face of as much difficulty as there was, to postpone the launch till another tide. The danger of postponing it on this tide for another quarter of an hour, or twenty minutes, that is another thing."

It is quite clear that the learned President was not in any way favourable to the last proposition as to danger.

"Mr. Laing: I want to deal with both propositions. You put it off for a quarter of an hour, and that quarter of an hour made the ebb tide stronger, you told me?—Yes."

Mr. Laing was not satisfied with this question. He then asked the following questions :—

" Supposing you had had to postpone it for a tide, could you have done so on the next tide?—No, we would have done it on the next daylight tide, two tides later.

" You would have had to keep her for two tides ?—Yes.

" What would you have had to do, with regard to these notices that you had given ?—We would have had to renew them all.

" Because, I daresay you know, they are sent round ?—They are sent to every one in the port.

" The President : You need not pursue this, after what I have said, need you ? "

The learned President was referring again to that which he had said before when a similar question was put—that it was not a reasonable thing for those people to ask for a postponement of the launch. As far as danger is concerned there is no admission whatsoever, and the learned President manifestly meant that the question of danger must be proved, and there is nothing in what he stated to shew that he was satisfied upon this point. Mr. Laing then asked the witness : " Leaving the launch in her condition, and being ready for the launch, would there be any danger to the ship herself, or to any of your men ? " It is obvious that Mr. Laing did not think the President relieved him from the obligation to prove the danger. The answer of the witness was : " It is a very dangerous thing at all times to let a launch be delayed. It is a very critical moment, and the launch might take charge, and go off at any moment, and with risk to both life and property in the yard." If that evidence stood alone, uncross-examined too, it might be unnecessary to consider the matter any more, but counsel for the plaintiffs, in cross-examination, asked these questions :—

" You have a hydraulic stopway for this purpose ?—We have, yes.

" Did you mean what you said in your letter to the captain of the schooner *Frances* ?—Certainly.

" You did ?—Yes.

" And, of course, if she is in the line of the launch, she will be

C. A. 1911

THE HIGHLAND LOCH.

Vaughan Williams L.J.

in serious danger, will she not?—Well, in the possible line of the launch—you cannot say what way the launch will come off.

"And if she is in the possible line of the launch, she is in serious danger, is she not?—Not in serious danger. There are many chances against her being struck.

"And many chances in favour of her being struck?—I should say one in twenty, perhaps.

"And you took the chance?—It was the lesser chance."

Now, I do not want to lengthen my judgment, but in the earlier part of the hearing there was evidence given plainly enough to indicate that the view was not unreasonable that, if you have got a hydraulic stop there, even though you had knocked away the wooden supports, yet still, generally speaking, the hydraulic stop would be quite enough to keep the launch in its position on the ways until the time of launching came. I should hesitate, if there was a finding specifically by the learned President on this matter of fact, to differ from him, but when one reads the other part of the evidence one sees the really great effect that the postponement of twenty minutes, or whatever the time was, had upon the tide and upon the direction which the launched ship would take; and one notices that if the ship had taken the line which she might have been expected to take if she had been launched at 12.30, the risk of striking the ketch would have been very small. I think it was really very small at the time, and that is the opinion not only of the witnesses for those who had charge of the launch, but it is the expressed opinion of the master of the ketch. His opinion was that if it had not been for the increased force and altered direction of the tide between 12.30 and the time when the launch actually took place, the launch really would have been effected without any substantial danger of collision. I have gone into this matter at some length because I am dealing with these two questions which I have set forth. With regard to the question as to whether, in the circumstances, the risk of launching was one which those in charge of the launch might reasonably take, I think there is a good deal to say for that, and I should not be disposed to differ from my brethren, who have a strong view upon that question. As to the question of the choice of the lesser evil, there is evidence both

ways as to what would have been the danger of postponing the launch; but again I say that I shall not differ from my brethren.

I think I ought to call attention to one or two observations which the learned President made in the course of his judgment —a judgment in which he found the *Highland Loch* solely to blame. Of course a possible finding would have been that both vessels were to blame, and prima facie I should have been disposed to agree with that view. I have not the slightest doubt but that the ketch was to blame; but as to the *Highland Loch* I can only say that if those in charge of the launch took the view that there was danger to life and property and that they would take the risk, I think that such a state of facts would justify the President in finding against them, whether it is the common law verdict against them, or whether it is an admiralty verdict against them—which would give them the benefit of both to blame.

The learned President in his judgment said: "The attitude taken by the master was in substance this: I cannot heave my anchor, and will not slip my cable, unless you will pay, or be answerable for it, or for a new anchor, and take my ketch away in safety." One must bear in mind in this case that the ketch would never have been put in the position in which she was if it had not been for the fact that the Cunard buoy had been taken away and that the moorings were left at the bottom of the river, and, being left there, were a source of danger; and that this was done at the instance of those who had the launching of the *Highland Loch*, who paid half the expenses of the removal of the buoy. The learned President continued: "The answer of Lang, in substance, was: 'I have nothing to do with paying for an anchor, and I have no authority to become answerable for it; but, if you will slip your cable, I will tow you away to a place of safety.' At the request of the master of the ketch, the tug made fast in order to draw her up to her anchor, and tried to heave her anchor, or to get her clear in that way." I have already read the paragraph with regard to the hope and expectation of the master of the ketch, and referred to the letter written by the defendants. I have already said that I think it is possible

C. A. 1911

THE HIGHLAND LOCH.

Vaughan Williams L.J.

to come to the conclusion that, although that letter did express a fear of an accident to person and property, yet in fact those who conducted the launch may have thought that there was no substantial danger. I say nothing more, excepting that the law is laid down by the President as follows: "If proper notice is given, vessels navigating the river, or anchored in it, must take all reasonable precautions to avoid a collision. On the other hand, those intending to launch a vessel must take precautions—and the 'utmost precautions'—against any injury being caused by the launch; and the burden of shewing that such precautions have been taken lies upon those managing the launch. These precautions are necessary, not merely to safeguard property, but to protect lives which may be in danger. For this purpose, amongst other things, there is a duty upon those about to launch a vessel to keep a good look-out, and, before giving the final order for launching, to ascertain that no ship is passing, or lying near, so as to be endangered by the launch: see *The Blenheim* (1) and *The Vianna*." (2) The learned President continues: "As to the two vessels which collided, I am of opinion that the master of the *Frances* was at fault in not slipping and buoying his anchor, and dropping, or being towed to a place of safety. He had no right to make it a condition, before taking the proper steps which good navigation required him to take in order to perform his obligation, that the anchor should be paid for or that an undertaking should be given to pay for it, or to replace it"—I agree that he had no such right. "The question is, not whether his conduct in making the demand in the interest of his owner was reasonable conduct in a servant; but whether he took reasonable steps in navigation to avoid danger." The learned President, after referring to the cases of *The Cachapool* (3) and *Davies* v. *Mann* (4), continues: "In the present case, the defendants, for their own purposes, determined to launch at a particular tide, whatever the consequences might be to the plaintiffs' vessel, and its crew. They did so, to the plaintiffs' injury." I unhesitatingly say myself that if that statement of fact by the learned judge is correct, the judgment as delivered

(1) 4 No. Ca. 393.
(2) Swa. 405.
(3) 7 P. D. 217.
(4) 10 M. & W. 546.

by him ought to stand, and that the *Highland Loch* ought to be held solely to blame. I wish to say in the most emphatic manner that if it be true that "the defendants, for their own purposes, determined to launch at the particular tide, whatever the consequences might be to the plaintiffs' vessel, and its crew," the *Highland Loch* was in the wrong. The learned President concludes: "This being so, the plaintiffs' negligence does not excuse the defendants, because they could, by the exercise of care, have avoided the mischief which their deliberate action caused." As I have said, those statements by the learned judge which I have just read are statements of fact which certainly are not uncontradicted by the evidence. There is direct evidence on the one hand that those who were conducting the launch, notwithstanding the letter written, really thought, as the master of the ketch thought, that there was no serious risk, and that at the moment when the launch began there was not any risk. Also, there is strong evidence that there was so much danger to be anticipated from the postponement of the launch that the necessity of choosing between two evils arose. When one considers what they really did, we cannot leave entirely out of consideration the fact that the demand for payment of 5*l.*, in case the anchor was really lost, was causing the dilemma in which the unfortunate vessel was. In all the circumstances I think the decision of the learned President cannot stand, and must be reversed on the ground I have mentioned, and I do not think, as at one time I thought might be the case, that we ought to find both vessels to blame.

FLETCHER MOULTON L.J. This is a case which turns upon the conflict of duties that arises when parties are put in a position of danger and difficulty by the improper action of one of them, and the decision of the Court in such a case must, in my opinion, turn upon the facts in the particular case; and a very small difference in the facts of two cases may lead the Court to come to different conclusions in the two cases. Therefore I think it would be of very little value to discuss, as a preliminary part of my judgment, hypothetical cases, so as to lay down a rule of law. It is better to ascertain what are the exact facts of

C. A. 1911

THE HIGHLAND LOCH.

Fletcher Moulton L.J.

this case and then see if there is any doubt as to the rule of law which we ought to apply.

What are the facts of this case? The accident occurred on the occasion of the launching of a large vessel from the shipyard of Cammell, Laird & Co. The launching of a vessel on tidal waters is unquestionably a proper and lawful user of a tidal river. It is a user of a very peculiar kind. To a certain extent it is for the moment an exclusive user, which interferes with the ordinary lawful user of the water by other vessels going up and down. On the other hand, as it is a lawful user, the persons who are using the waterway must, on the comparatively rare occasions when such an event happens, respect it and adapt their conduct to the necessities of the launch. In the present case the plaintiffs' ketch came into the river at a time when all proper warnings and notices had been given that this launch was to take place at 12.30. In addition there was all the display of flags which is associated with a launch, and two tugs were out with flags on them. I should have thought it reasonable to suppose that vessels coming into the Mersey and knowing that launches might take place would have paid sufficient attention to these signals and would have known what was going to occur. However the evidence is that the plaintiffs' master did not know of it until he cast anchor in a place nearly opposite the shipbuilding yard, and unfortunately his anchor fouled some moorings.

Now, a launch has to be prepared for. The ship must be built in a perfectly stable position. The consequence is that, as every one knows, there are solid, though temporary, structures built round it, so that it is in a position of complete safety during the long period occupied in its building. When the time for launching the ship arrives, for hours before the launch men are occupied in taking away all these structures which give stability and safety to the ship while being built, until at last you come to a condition in which the ship is unquestionably in a most insecure position as it lies; but it can be freed and allowed to go into the water by the mere release of the hydraulic brakes. This operation of freeing the ship from its supporting structures had been going on from 6 o'clock in the morning to prepare for the launch at 12.30, and therefore it took, even with the strong gangs of the

shipbuilding yard, something like six hours to free the ship. So far as I can see the position of the plaintiffs' vessel was discovered about 10.30, and warning was given to it to clear out of the way. That was repeated at 11.30, and then, finally, there was a very express intimation to the master that he must get out of the way a little after 12 o'clock. What was the position he took up? He took up the position that he had come there, his anchor was fast, and being there he had a right to remain there, and he could name his own terms for going. In my opinion he was entirely wrong. He had no right to be there. The reasonable user at that moment of the waterway required that the place where he was should be left vacant for the purposes of the launch, and even though he could not go away without some inconvenience to himself, yet he was bound to do so in order to leave the proper user of the waterway for the launch on the occasion on which it was fixed. The user of such a highway as this is a good example of the proverb "Live and let live." People must use it reasonably, and must respect the fact that their fellow countrymen also have the right of using it reasonably.

I do not think there was any doubt in the Court below, nor is there any doubt in the mind of any of us, that the position which the master of the ketch took up was thoroughly unreasonable. All he had to do was to slip and buoy his anchor, and when he came back he could get hold of the chain and be in exactly as good a position as he was at the moment when he was required to go away. He stubbornly refused to go, and his refusal in all its details shews that not only did he take up a thoroughly unreasonable position, but he attempted to use the position which he had accidentally acquired, and which he had no right to maintain, for the purpose of gaining an undue advantage. He offered to go if they would give him a new anchor. He had no right to make such terms. His duty was to do all he reasonably could to permit the launch to go on. What was the consequence of this? In my opinion it created a position in which the defendants were obliged to choose between two evils. One was to postpone the launch: the other was to let the launch take place: and I further say that the necessity of choosing between these two evils arose at the last moment and after 12 o'clock was past. In other words,

C. A. 1911

THE HIGHLAND LOCH.

Fletcher Moulton L.J.

it arose when the launch was all ready to take place, when the vessel was absolutely denuded of the structures which had rendered it safe during the period of building, and when there was only a slight, though no doubt efficient, obstacle which prevented it from going into the water of its own accord.

The defendants put forward plainly in evidence the danger of postponing the launch at that late hour, and the reason why I differ from the conclusion to which the learned President came is that I think he did not fully appreciate the seriousness with which the defendants insisted on this, which I consider to have been their true defence, and the absolutely uncontradicted character of the evidence in its favour. [The learned Lord Justice dealt at length with the evidence as to the danger of postponing the launch, and continued:]

Now let me turn to the evidence of the probable consequences of allowing the launch to take place. Here we come to a very strange state of things. The plaintiffs' evidence—evidence of fact given by two men, the master of the ketch and, I think, the mate—is emphatic that there was no danger at all in their opinion. The master is asked these questions:—

"How did she come?—She came off, and then turned stern down towards us. She would have gone away clear of us, if she had gone straight off altogether. She came half off, and then turned stern towards us.

"When you were hung up by the moorings were you lower down the river?—Just below the line of the yard.

"Do you know this place well enough to say whether you were opposite the basin, or whether you were opposite the yard?—No, I could not say exactly now.

"At any rate you were below the line of the launch?—Yes, just below the line of the launch.

"And if she had gone out straight, she would have gone out all clear, would she?—Yes."

Then he was asked: "Did you think she would touch you when she was launched?" and his answer was "No." Then the President says: "The question is, if the launch was going to take place, did you think you were safe?—Yes, I did not think she was coming on us. Do you mean that if the vessel

was launched, you would still be safe?—Yes, I thought the vessel would come off above us." Thus the effect of the evidence of the master and mate is that there was no ground for thinking there would be a collision.

When I turn to the evidence called on behalf of the defendants, it indicates that the danger of the ketch being struck was very slight. The yard manager says, "I thought there was a slight risk." Then he was asked, "But you were willing to run it?" He answered, "I thought it was so very slight."

In my opinion the manager of the defendants' yard realized that there was a serious danger in postponing the launch, and certainly he must have realized that the magnitude of the risk of an accident arising from such circumstances would be very much greater than the magnitude of an accident arising from collision with the ketch. I think it is clear also that everybody thought that the danger from collision if the launch took place at once was remote, and I am quite satisfied that the manager realized that the general danger would be increased by delay, and that he must act at once.

Now, what is the legal principle to be applied? In my opinion, if by their unreasonable conduct the plaintiffs put the defendants into a position where they had to make an immediate choice of one of two courses of action, both of which involved risk, the plaintiffs do not succeed in their case unless they shew that the choice which under those circumstances the defendants made was one which was negligently or improperly made. They do not succeed by merely establishing, "You knew that the course which you took brought with it a risk of injury." The defendants have a right to say, "You did not give us the opportunity of avoiding the danger—danger to life in this case—and our duty was to do that which minimized the danger." It is no use saying that letting the launch go was an act and that not letting it go was doing nothing. There are cases in which doing nothing is as much an act and as responsible an act as doing something; and in this case the leaving the ship in the position in which she was, instead of letting her go into the water, was in my opinion reasonably considered by the defendants to be causing a greater risk to life as well as to

C. A. 1911

THE HIGHLAND LOCH.

Fletcher Moulton L.J.

property than letting her go and completing the launch as was intended.

For these reasons I am of opinion that no case of negligence or improper conduct has been made out against the defendants and that those in charge of the plaintiffs' ketch were solely to blame.

I cannot but think, from the very accurate enunciation of principles of law which I find in the judgment of the President, that he would have come to the same conclusion if he had not by inadvertence thought that he was relieved from considering the question of the danger of postponing the launch by reason of its not being relied upon as the main line of defence. I feel satisfied that it was relied upon, and relied upon as the first line of defence, but I think I can understand how it was that the President thought that it was not so relied on. By holding on to the second and weaker line of defence, which depended mainly on cross-examination, the defendants must have made it loom so large in the mind of the President that he forgot it was only a second line of defence and that there was a first and impregnable one, which rested on evidence that was practically uncontradicted and on the short principle that if, by your own fault, you put a man into a position where he is obliged to choose between two evils, then, if there is no negligence in his choice, and he chooses what he honestly believes to be the lesser evil, you cannot blame him.

Buckley L.J. There are two questions to be decided—first, whether the ketch is to blame; and, secondly, whether the launch is to blame. It is not worth while to discuss the first question at any length. The President, from whom this appeal is brought, all the members of this Court, and our assessors are of opinion that the ketch was to blame. I entirely agree with the observations made by the President on this part of the case. As regards our assessors, a question was put to them as to what was the reasonable course for the master of the ketch to take, and they said "he should have slipped his cable, provided the tug kept hold of him, towed him to a place of safety, and brought him back to his cable." That was offered him, and he refused. To state the position in my own words, it was this: The ketch

had sustained a misfortune. She was coming up dragging her anchor, and it caught in some moorings and she could not lift it. She had no business to be there in the sense that though this was a highway for the use of all vessels, it was reasonably at this moment to be used only by one. The defendants were entitled for the purpose of the launch reasonably to say to persons navigating the river, "Go away, we are going to make an extraordinary use of the highway for a short time." The master of the ketch was bound to act reasonably. He had, as I have said, become entangled and could not go unless he did a very simple act. He was not permanently fixed to the anchor. The anchor may be said to have been for the moment inextricably fixed to the bottom, but he had only to slip and buoy his cable and he could be taken away in safety and brought back in safety. There was no difficulty about the matter. He refused to do what was reasonable, and under those circumstances he was in my opinion to blame for not clearing the highway for the proper user of it by the launch for a temporary purpose.

The second question is this: Was the launch to blame? What was the position of the defendants? There was this ketch lying in the river, and I am satisfied, if it is material, that the mental attitude of the master of the ketch was that he was perfectly safe. What was the mental attitude of the owners of the launch? Upon the evidence I come to the conclusion that to the mind of the manager of the defendants' yard there was some risk as regards striking the ketch, but he thought that it was a negligible risk. It was a possibility—the thing might happen and in point of fact it did happen—but he thought it was a negligible risk—a factor in the situation which he had to bear in mind, but not the only factor to be borne in mind. Another significant factor was this: that if he did not launch on this tide he was confronted with another danger—there was the ship in a position in which she was held up by the hydraulic stop. Unless he launched on this tide he had to face the difficulty that she might launch herself at any moment. Moreover, he could not launch on a later tide without serving fresh notices. In the meantime his position was one of peril. He must either leave the ship as she was and take the risk or he must replace the shores.

C. A. 1911

THE HIGHLAND LOCH.

Buckley L.J.

On the evidence I think it is established that there was a serious danger to life and property if he left things as they were. He was confronted with this state of things: There lies that ketch in the river; I may strike her. I do not think I shall, but it is possible I may. It is a slight and a negligible risk. On the other side I am confronted with this: that unless I launch within the next five minutes I have to face the possibility of this ship launching herself; and the public generally will be at great risk on resuming the ordinary navigation of the river. What was he to do? Can it possibly be said it was unreasonable of him, taking all the circumstances into consideration, to accept the risk of striking the ketch? To my mind it was not unreasonable. It is perfectly plain that he had done everything reasonable by way of seeking to induce the ketch to go away, and in my opinion there was no negligence, in this state of facts, in letting the launch go on. If that be so the defendants, owing a duty to the ketch and also to others who might be injured by the course which they chose to take, reasonably discharged their duty to all those to whom they owed a duty by accepting the responsibility of launching the vessel as they did.

For these reasons, in my judgment the defendants were not to blame and there was blame to be attached to the ketch.

I only want to say one word on a sentence in the judgment of the learned President: "In the present case, the defendants, for their own purposes, determined to launch at the particular tide, whatever the consequences might be to the plaintiffs' vessel and its crew." If the evidence had established that state of facts, I should have agreed with the judgment of the President, but I desire to say that to my mind the evidence does not establish that state of facts. I think that by the stubborn, obstinate conduct of the master of the ketch the defendants were placed in a position of considerable embarrassment and difficulty, and I think they adopted the reasonable way out of it, and that they were not considering their own purposes only and disregarding the consequences to the ketch. I think they were weighing all the consequences which they ought to have weighed and which would determine their course of action; and I think they adopted a reasonable course of action. In my opinion judgment

ought to be entered for the appellants, and the *Frances* pronounced alone to blame.

Appeal allowed.

Solicitors for appellants (defendants), owners of the *Highland Loch*: *Rawle, Johnstone & Co., for Laces, Wilson, Tod, Stone & Co., Liverpool.*

Solicitors for respondents (plaintiffs), owners of the *Frances*: *Holman, Birdwood & Co.*

T. L. M.

THE END.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 2, 1911, will be as follows:—

In the First Series,
[1911] 1 Ch. [1911] 2 Ch.

In the Second Series,
[1911] 1 K. B. [1911] 2 K. B. [1911] P.

In the Third Series,
[1911] A. C.

INDEX.

ADMINISTRATION—Probate.
See under PROBATE.

ADMIRALTY.
See under SHIPPING.

ADULTERY.
See under DIVORCE.

AFFIDAVIT—Privilege—Briefs for counsel—Production of documents - - **181**
See PROBATE. 5.

ALIMONY—Judicial separation — Alimentary provision for wife - - - **203**
See DIVORCE. 6.

APPEAL—Desertion—Appeal from justices—Summary jurisdiction—Second summons for same cause of complaint—Res judicata - - - - - **195**
See DIVORCE. 4.

ARBITRATION — Shipping—Bill of lading—Incorporation of charterparty — Demurrage—Arbitration clause - **54**
See SHIPPING. 1.

BARRY DOCK ENTRANCE—Ship—Collision—Crossing rule—Application of rule **69**
See SHIPPING. 3.

BILL OF LADING—Shipping.
See under SHIPPING.

CASES:—

—— "*Grovehurst*," *The* - - [1910] P. 316
Referred to by Bargrave Deane J. THE "RAGNHILD" - [**1911**] **P. 254**

—— *Hamilton* v. *Mackie* (1889) 5 Times L. R. 677.
Followed by C. A. THE "PORTSMOUTH" - - - [**1911**] **P. 54**

—— *Kay* v. *Kay* - - - [1904] P. 382
Approved by C. A. STEVENSON *v.* STEVENSON - - [**1911**] **P. 191**

—— *Kemp-Welch* v. *Kemp-Welch* [1910] P. 233.
Applied by C. A. SANDERS *v.* SANDERS - - - [**1911**] **P. 101**

CASES—*continued.*

—— *Lapington* v. *Lapington* (1888) 14 P. D. 21
Approved by C. A. STEVENSON *v.* STEVENSON - - - [**1911**] **P. 191**

—— *Leyman* v. *Latimer* - (1878) 3 Ex. D. 352
Dictum of Bramwell L.J. doubted by Samuel Evans, Pres. IN THE ESTATE OF CRIPPEN - - [**1911**] **P. 108**

—— "*Mac*," *The* - - (1882) 7 P. D. 126
Followed by Bargrave Deane J. THE "MUDLARK" - - [**1911**] **P. 116**

—— *Morphett* v. *Morphett* (1869) L. R. 1 P. & M. 702.
Disapproved and not followed by Samuel Evans, Pres. The dissenting judgment of Willes J. in that case approved and adopted. BROWNING *v.* BROWNING - - - [**1911**] **P. 161**

—— "*Portsmouth*," *The* - - [1910] P. 293
Reversed by C. A. - [**1911**] **P. 54**

—— "*Sans Pareil*," *H.M.S.* - [1900] P. 276
Referred to by C. A. THE "HERO" - - - [**1911**] **P. 128**

—— *Weir* v. *Richardson* (1897) 3 Com. Cas. 20
Dicta in, followed by Div. Ct. THE "KINGSLAND" - - [**1911**] **P. 17**

—— "*West Cock*," *The* - - [1911] P. 23
Affirmed by C. A. - [**1911**] **P. 208**

—— *Yates and Others* v. *Kyffin-Taylor and Wark* [1899] W. N. 141.
Disapproved by Samuel Evans, Pres. IN THE ESTATE OF CRIPPEN [**1911**] **P. 108**

—— *Yeatman* v. *Yeatman* (1869) 39 L. J. (P. & M.) 37.
Overruled by C. A. SANDERS *v.* SANDERS - - - [**1911**] **P. 101**

CHARTERPARTY—Shipping.
See under SHIPPING.

COLLISION — Barry Dock entrance—Crossing rule—Application of rule - - **69**
See SHIPPING. 3.

COLLISION—*continued.*

—— Compass bearing - - - - - 248
See SHIPPING. 4.

—— "Ship"—Limitation of liability—Hopper barge - - - - - - - 116
See SHIPPING. 6.

—— Shipping — Launch — Duty of vessel anchored in track of launch - 261
See SHIPPING. 5.

—— Single ship and squadron of warships—Negligence—Contributory negligence
See SHIPPING. 7. 128

—— Steam trawler "engaged in trawling"—Steamship crossing—Effect of exhibition of triplex light—Giving way - 254
See SHIPPING. 8.

—— Thames, River — Port of London—Compulsory pilotage—"Master"—Duty of look-out in the river Thames - 234
See SHIPPING. 9.

—— Thames, River—Proper mode of keeping a look-out in the river Thames - 245, n.
See SHIPPING. 10.

—— Upper Humber — Rounding the bend at Whitton Gas Float No. 3—Navigation - - - - - - 92
See SHIPPING. 11.

COLLISIONS AT SEA (REGULATIONS FOR PREVENTING), 1897, arts. 9 (1906) (*d*) 1., 19, 21 - - - - 254
See SHIPPING. 8.

—— **art. 17, Preliminary** - - - - 248
See SHIPPING. 4.

—— **arts. 21, 23, 27** - - - - - 69
See SHIPPING. 3.

—— **art. 28** - - - - - - - 128
See SHIPPING. 7.

COMPASS—Ship—Collision — Compass bearing
See SHIPPING. 4. 248

CONDONATION — Adultery — Non-compliance with subsequent decree for restitution of conjugal rights — Statutory desertion - - - - - - - - 201
See DIVORCE. 1.

CONSERVANCY BOARD — Ship — Navigable river — Damage to oyster beds—Liability of Conservancy Board for negligent act of harbour-master—Non-liability of owner of vessel - - 40
See SHIPPING. 12.

CO-RESPONDENT — Costs — Decree nisi — Reconciliation of petitioner and respondent—Motion to rescind decree - 180
See DIVORCE. 2.

COSTS—Divorce.
See under DIVORCE.

——Divorce—Wife's costs—Successive petitions by husband—Dismissal of first petition with costs—Non-payment by husband—Stay of proceedings on second petition - - - 101
See DIVORCE. 8.

COSTS—*continued.*

—— Security for—Order of justices—Summary Jurisdiction (Married Women) Act—Husband's appeal—Order for security—Stay - - - - - - - 38
See PRACTICE.

—— Shipping — Collision — Contributory negligence - - - - - - - 128
See SHIPPING. 7.

COUNSEL — Briefs for counsel — Privilege — Production of documents—Affidavit 181
See PROBATE. 5.

CROSS-EXAMINATION.
See under EVIDENCE.

CRUELTY—Divorce.
See under DIVORCE.

CUSTOM — Ship — Charterparty— Demurrage—Custom of port—Discharge by harbour authority — Delay not attributable to charterer - - - - - - 17
See SHIPPING. 2.

DEMURRAGE—Shipping.
See under SHIPPING.

DESERTION.
See under DIVORCE.

DISCOVERY—Privilege—Briefs for counsel—Production of documents—Affidavit 181
See PROBATE. 5.

DISCRETION—Divorce—Verdict and judgment for King's Proctor—Discretion of Court—Petition not dismissed—Decree absolute - - - - - - - 83
See DIVORCE. 11.

DIVORCE — *Adultery — Condonation — Non-compliance with subsequent Decree for Restitution of Conjugal Rights—Statutory Desertion—Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68), *s.* 5—*Matrimonial Offences — Revival of Condoned Adultery—Decree Nisi.*

The matrimonial offence of desertion created by reason of non-compliance with a decree for restitution of conjugal rights revives condoned adultery. PRICE *v.* PRICE AND BROWN
Samuel Evans, Pres. 201

2. —— *Costs—Co-respondent—Decree Nisi—Reconciliation of Petitioner and Respondent—Motion to rescind Decree—Fresh Order, condemning Co-respondent in Costs—Practice.*

The petitioner and respondent in a suit for divorce having become reconciled after the decree nisi and before decree absolute, the petitioner moved to rescind the decree and dismiss the petition.

The Court directed that the order rescinding the decree nisi and dismissing the petition should contain a provision condemning the co-respondent in the costs of the petition, as taxed. QUARTERMAINE *v.* QUARTERMAINE AND GLENISTER - - **Bargrave Deane J.** 180

3. —— *Cruelty—Wife's Petition—Wilful or reckless Communication of Disease—Sufficiency of Evidence.*

In order to establish a charge of legal cruelty

DIVORCE—*continued.*

against a husband for communicating a venereal disease to the wife it is not necessary to allege or prove that he knowingly wilfully or recklessly communicated the disease; it is sufficient for the wife to allege and to prove that she was infected by the husband with a venereal disease; and the burden is upon him to prove that the disease was communicated in such circumstances as not to amount to legal cruelty.

The decision of the Full Court in *Morphett* v. *Morphett* (1869) L. R. 1 P. & M. 702, disapproved and not followed. The dissenting judgment of Willes J. in that case approved and adopted. BROWNING *v.* BROWNING

Samuel Evans, Pres. 161

4. —— *Desertion — Practice — Appeal from Justices — Summary Jurisdiction (Married Women) Act*, 1895 (58 *&* 59 *Vict. c.* 39)—*Second Summons for same Cause of Complaint—Res Judicata.*

A wife, whose summons, under the Summary Jurisdiction (Married Women) Act, 1895, has been heard and dismissed, cannot obtain an order on a second summons founded on the same cause of complaint. The matter is res judicata; and this is so, notwithstanding that desertion is a continuing offence. STOKES *v.* STOKES

Div. Ct. 195

5. —— *Judicial Separation — Petition — Statutory Period of Desertion—Effect of Proceedings for Judicial Separation—Supplemental Petition—Matrimonial Causes Act*, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 27.

The filing and prosecution of a suit for judicial separation precludes the petitioner from successfully pleading that the period of desertion was running during the time the suit was being maintained.

Lapington v. *Lapington* (1888) 14 P. D. 21, and *Kay* v. *Kay* [1904] P. 382, approved. STEVENSON *v.* STEVENSON - - **C. A. 191**

6. — *Judicial Separation—Practice—Alimentary Provision for Wife—Misconduct of the Petitioner other than of a Matrimonial Nature—All the Circumstances to be considered in each Case.*

The general conduct of a wife, who has proved her husband guilty of a matrimonial offence and obtained a decree against him, must be looked at and considered when the Court is asked by her to order permanent alimony; just as it ought to be considered upon an application for alimony pending suit.

The petitioner is not, merely by reason of having proved her husband guilty of a matrimonial offence and being herself innocent of any matrimonial offence, entitled as against her husband to any particular proportion of his income; though, if she has no means whatever, even though her conduct before and after matrimony has been reprehensible, the husband is bound to allow her a sum which will enable her to live a respectable life. LESLIE *v.* LESLIE

Samuel Evans, Pres. 203

7. —— *Pleas of Connivance and Conduct conducing to Adultery—Evidence of Respondent*

DIVORCE—*continued.*

—Cross-examination — The Evidence Further Amendment Act, 1869 (32 *&* 33 *Vict. c.* 68), *s.* 3.

Where, in a suit for dissolution of marriage brought by a husband, the wife goes into the witness-box and gives evidence of her own adultery in support of pleas of connivance and conduct conducing to adultery raised by her answer, she may be asked questions in cross-examination relating to the time and circumstances of such adultery. RUCK *v.* RUCK AND CROFT - - - **Samuel Evans, Pres. 90**

8. —— *Practice—Costs—Wife's Costs—Successive Petitions by Husband — Vexatious Proceedings—Dismissal of First Petition with Costs —Non-payment by Husband—Stay of Proceedings on Second Petition.*

A husband's petition for divorce having been dismissed with costs, which had been taxed, and part of which remained unpaid, the husband filed a second petition for divorce, the adultery alleged in the second petition being prior in date to the filing of the first petition but with different co-respondents:—

Held, that all proceedings in the second petition ought to be stayed until the husband had paid the wife's costs of the first petition.

Adultery with a different co-respondent is not a different cause of action.

Kemp-Welch v. *Kemp-Welch* [1910] P. 233, applied.

Yeatman v. *Yeatman* (1869) 39 L. J. (P. & M.) 37, overruled. SANDERS *v.* SANDERS **C. A. 101**

9. —— *Practice—Wife's Petition for Judicial Separation—Costs of Wife—Change of Solicitor —Bill of Costs—Solicitors Act*, 1843 (6 *&* 7 *Vict. c.* 73), *s.* 37—*Resumption of Cohabitation—Application to dismiss Petition, both Parties concurring —Opposition of former Solicitor of Wife—Refusal to dismiss Petition — Jurisdiction of Court — Remedy.*

A wife, petitioner in a suit for judicial separation, cannot, by merely giving notice of change of solicitors, deprive the solicitor who has hitherto represented her in the suit of his right to carry in his bill and tax his costs in the Divorce Division, so as to compel him to have recourse to an action at common law against the husband for necessaries.

Where the parties to a matrimonial suit have returned to cohabitation, a solicitor who has acted for the wife is entitled to object to an order for dismissal of the petition unless provision is made for his costs, and the proceedings may be stayed, pending the carrying in of his bill and the taxation of his costs.

The reasonableness of the items in the bill can be discussed and dealt with by the taxing officer upon the taxation in the Divorce Division. JINKS *v.* JINKS - **Samuel Evans, Pres. 120**

10. —— *Variation of Settlements—Practice —Answer to Petition before Decree Absolute— Preliminary Investigation by Registrar—Jurisdiction—Matrimonial Causes Act*, 1859 (22 *&* 23 *Vict. c.* 61), *s.* 5.

The Court has no jurisdiction either by itself or through its officers to hold any inquiry upon a petition to vary settlements until the decree for

DIVORCE—*continued.*
dissolution has been made absolute, and until that time the respondent to the petition is under no obligation to answer it. CLARKE *v.* CLARKE AND LINDSAY - - - - - - **C. A. 186**

11. —— *Wife's Petition—Adultery of Petitioner conduced to by Husband's Cruelty and Misconduct — Material Fact — Suppression and Denial by Petitioner — Verdict and Judgment for King's Proctor—Discretion of Court—Petition not dismissed—Decree Absolute.*

In exercising the discretion conferred upon it by s. 31 of the Matrimonial Causes Act, 1857, the Court ought to look at every aspect and circumstance of the case, including the consequences that would ensue, not only in the present but in the future, from a refusal to exercise that discretion in favour of the petitioner.

Where the conduct of the husband (respondent) had driven the wife (petitioner) to leave him and had conduced to her subsequent adultery, the Court exercised its discretion in her favour and allowed the decree to be made absolute, notwithstanding the fact that, at the hearing of the petition, acting upon the advice of counsel, of which the Court now expressed disapproval, the petitioner had said nothing as to her association and voyage to New Zealand with a man; and notwithstanding the further fact that she had, upon issues raised by the King's Proctor, denied on oath the adultery with that man, and had not been believed. PRETTY *v.* PRETTY - - - **Bargrave Deane J. 83**

DOCK—Barry Dock entrance—Ship—Collision—Crossing rule—Application of rule **69**
See SHIPPING. 3.

DOMICIL—Foreign domicil — English will of English realty—German will of general estate—Separate executors - - **172**
See PROBATE. 2.

ESTOPPEL—Probate, Action by executor for revocation of—Laches - - - **175**
See PROBATE. 1.

EVIDENCE—Divorce—Evidence of respondent—Cross-examination - - - **90**
See DIVORCE. 7.

—— Probate — Administration — "Special circumstances"—Murder of wife by husband—Effect of conviction as evidence
See PROBATE. 3. **108**

EXECUTOR—Probate.
See under PROBATE.

FOREIGN DOMICIL.
See under DOMICIL.

GRANT OF PROBATE.
See under PROBATE.

HARBOUR AUTHORITY—Discharged by—Ship—Delay not attributable to charterer
See SHIPPING. 2. **17**

HARBOUR-MASTER—Ship—Navigable river—Damage to oyster beds—Liability of Conservancy Board for negligent act of harbour-master—Non-liability of owner of vessel - - - - - **40**
See SHIPPING. 12.

HOPPER BARGE—"Ship"—Collision—Limitation of liability - - - - **116**
See SHIPPING. 6.

HUMBER—Ship—Collision—Upper Humber—Rounding the bend at Whitton Gas Float No. 3—Navigation - - **92**
See SHIPPING. 11.

HUSBAND AND WIFE—Costs, Security for—Order of justices—Summary Jurisdiction (Married Women) Act — Husband's appeal—Order for security—Stay - **38**
See PRACTICE.

—— Probate — Administration — "Special circumstances"—Murder of wife by husband—Evidence - - - - **108**
See PROBATE. 3.

JUDICIAL SEPARATION—Statutory period of desertion—Effect of proceedings for judicial separation—Supplemental petition - - - - - - - **191**
See DIVORCE. 5.

JURISDICTION—Divorce—Summary jurisdiction—Desertion—Appeal from justices—Second summons for same cause of complaint—Res judicata - - **195**
See DIVORCE. 4.

—— Divorce—Variation of settlements—Answer to petition before decree absolute—Preliminary investigation by registrar
See DIVORCE. 10. **186**

—— Summary Jurisdiction (Married Women) Act—Costs, Security for—Order of justices—Husband's appeal—Order for security—Stay - - - - - **38**
See PRACTICE.

JUSTICES—Costs, Security for—Order of justices—Summary Jurisdiction (Married Women) Act—Husband's appeal—Order for security—Stay - - - **38**
See PRACTICE.

KING'S PROCTOR—Verdict and judgment for—Discretion of Court—Petition not dismissed—Decree absolute - - **83**
See DIVORCE. 11.

LACHES — Probate, Action by executor for revocation of—Executor next of kin
See PROBATE. 1. **175**

LAUNCH—Shipping—Duty of vessel anchored in track of launch - - - - **261**
See SHIPPING. 5.

LIMITATION OF LIABILITY — "Ship" — Collision—Hopper barge - - **116**
See SHIPPING. 6.

LONDON (PORT OF)—Ship—Collision—River Thames — Compulsory pilotage — "Master"—Duty of look-out in the river Thames - - - - - **234**
See SHIPPING. 9.

MARRIED WOMAN.
See under HUSBAND AND WIFE.

"MASTER"—Ship—Collision—River Thames—Port of London—Compulsory pilotage—Duty of look-out in the river Thames **234**
See SHIPPING. 9.

MATRIMONIAL CAUSES ACTS.
See under DIVORCE.

MERCHANT SHIPPING.
See under SHIPPING.

NEGLIGENCE — Ship — Navigable river — Damage to oyster beds—Liability of Conservancy Board for negligent act of harbour-master—Non-liability of owner of vessel - - - - - - **40**
See SHIPPING. 12.

—— Shipping — Collision — Single ship and squadron of warships — Contributory negligence - - - - - - **128**
See SHIPPING. 7.

NEXT OF KIN—Probate — Legal personal representative of husband passed over—Grant to next of kin of wife - **108**
See PROBATE. 3.

OYSTER BEDS—Ship — Navigable river — Damage to oyster beds—Liability of Conservancy Board for negligent act of harbour-master—Non-liability of owner of vessel - - - - - - **40**
See SHIPPING. 12.

PILOTAGE—Ship—Collision — River Thames—Port of London—Compulsory pilotage—Duty of look-out in the river Thames **234**
See SHIPPING. 9.

PORT OF LONDON — Ship—Collision — River Thames — Compulsory pilotage — "Master"—Duty of look-out in the river Thames - - - - **234**
See SHIPPING. 9.

PRACTICE — *Security for Costs — Order of Justices — Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39)—*Husband's Appeal—Order for Security—Stay.*

A husband having appealed from an order obtained by his wife under the Summary Jurisdiction (Married Women) Act, 1895, application for security for the wife's costs was made to a judge in chambers supported by an affidavit stating that he had no property to answer any order for costs and also stating that the wife had no means of her own. An order was made that the husband (appellant) should pay into Court or give security for the costs of his wife (respondent on the appeal), and the hearing of the appeal was stayed meanwhile. SIRRELL *v.* SIRRELL - - **Bargrave Deane J. 38**

PRACTICE—*continued.*

—— Probate.
See under PROBATE

PRIVILEGE—Briefs for counsel—Production of documents—Affidavit - - - **181**
See PROBATE. 5.

PROBATE—*Executor Next of Kin—Action by Executor for Revocation of Probate—Knowledge of all Facts at Date of Probate—Estoppel—Laches—Will.*

An executor, who is also next of kin of the testator, and who takes probate with knowledge of all the facts, is not disabled from taking proceedings to contest the validity of the will in the same manner as a bare executor would be under similar circumstances. The fact of his having taken probate, if a reasonable explanation is given for having done so, does not estop him from afterwards instituting proceedings to disaffirm the will.

Whether there have been laches on the part of the person disputing a will is a question of fact. A certain amount of delay on the part of an executor, who is also next of kin, in instituting proceedings to prevent probate, does not necessarily amount to negligence on his part or warrant the Court in holding, notwithstanding that he had all along full knowledge of the facts, that it would be inequitable to allow him to proceed to impeach the will, especially if the assets have not been distributed and if his conduct has not led other persons to alter their position to their own detriment. WILLIAMS *v.* EVANS - - - - **Horridge J. 175**

2. —— *Foreign Domicil — English Will of English Realty — German Will of General Estate—Separate Executors—Limited Grant to Persons entitled to General Grant—Cæterorum Grant—Practice—Rules and Orders*, 1862, *r.* 30—*Rules and Orders*, 1863, *r.* 35.

The Court may, if it think fit, depart from the usual practice of refusing a limited grant to a person entitled to a general grant of probate.

A testator, domiciled abroad, left an English will dealing exclusively with realty in England and appointing English executors; and he left also a foreign will, appointing a foreign executor and dealing with all the rest of his estate, which included personalty in England.

The Court granted to the English executors probate of the English will, and made a cæterorum grant in favour of the foreign executor. IN THE ESTATE OF BARON VON BRENTANO - - **Samuel Evans, Pres. 172**

3. —— *Practice—Administration—"Special Circumstances"—Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73—*Husband and Wife—Murder of Wife by Husband — Evidence — Effect of Conviction as Evidence—Res inter alios acta—Legal Personal Representative of Husband passed over—Grant to Next of Kin of Wife.*

A certified copy of the conviction of a husband for the murder of his wife is admissible in evidence against him in a civil proceeding inter alios acta, and is admissible not merely as proof

PROBATE —*continued.*
of the conviction, but also as prima facie evidence of the commission of the crime.

The conviction of a husband of the murder of his wife

Held to be a "special circumstance" within the meaning of s. 73 of the Court of Probate Act, 1857; and the Court passed over the legal personal representative of the husband and granted administration to the estate of the intestate wife, upon the application of one of her next of kin.

Dictum of Bramwell L.J. in *Leyman* v. *Latimer* (1878) 3 Ex. D. 352, doubted.

Yates and Others v. *Kyffin-Taylor and Wark* [1899] W. N. 141, disapproved. IN THE ESTATE OF CRIPPEN - - **Samuel Evans, Pres. 108**

4. —— *Practice—Administration with Will annexed to Executor of Residuary Legatee—Suit for Revocation of Probate of Will of such Legatee—Appointment of Administrator and Receiver pendente lite to act as to both Estates.*

A. died making B. his executor and residuary legatee. Eight days later B. died without having proved A.'s will. On the day B. died she was alleged to have executed a will naming C. as her executor. C. proved this will and then obtained letters of administration to the estate of A. with his will annexed.

D. brought a suit against C. and others for revocation of the probate of B.'s will. An application by C. to appoint him administrator and receiver pendente lite in the estate of B. was opposed by D., and the Court ordered the appointment of an independent person with power to act as to both estates. SHORTER *v.* SHORTER - - - **Samuel Evans, Pres. 184**

5. —— *Practice—Production of Documents—Affidavit—Privilege—Briefs for Counsel.*

Upon an application, in probate proceedings, for inspection of certain documents admitted to be in the possession of opposing parties, who objected to produce them :—

Held, that the objection was good, for the documents were privileged, being briefs prepared confidentially by the direction of the solicitor for the deceased, the sole defendant in a former action, and as a confidential communication between the solicitor and the counsel briefed on behalf of the said defendant solely with the object and purpose of enabling the counsel to conduct the said defence, and on the appeal from the judgment in the said action. CURTIS *v.* BEANEY - - - **Bargrave Deane J. 181**

—— Rules and Orders, 1862, r. 30—Rules and Orders, 1863, r. 35 - - - **172**
See PROBATE. 2.

PROOF—Salvage—Claim by tug engaged to tow—Obligations under towage contract—Burden of proof - - - - - **1**
See SHIPPING. 13.

RES JUDICATA—Desertion—Appeal from justices—Second summons for same cause of complaint - - - - - **195**
See DIVORCE. 4.

RESTITUTION OF CONJUGAL RIGHTS —Adultery—Condonation—Non-compliance with subsequent decree for restitution of conjugal rights.
See DIVORCE. 1.

—— Divorce.
See under DIVORCE.

REVOCATION —Probate.
See under PROBATE.

RIVER—Ship—Navigable river—Damage to oyster beds—Liability of Conservancy Board for negligent act of harbourmaster—Non-liability of owner of vessel - - - - - - - **40**
See SHIPPING. 12.

SALVAGE—Shipping.
See under SHIPPING.

SECURITY FOR COSTS.
See under COSTS.

SEPARATION—Judicial separation.
See under DIVORCE.

SETTLEMENTS—Variation of—Divorce.
See under DIVORCE.

SHIPPING—*Bill of Lading—Incorporation of Conditions of Charter Party—Demurrage—Arbitration Clause.*

Goods were shipped under a bill of lading by which they were deliverable to the shipper or to his assigns, "he or they paying freight for the said goods with other conditions as per charter party," and in the margin was written in ink "Deck load at shipper's risk and all other terms and conditions and exceptions of charter to be as per charter party including negligence clause."

The charter party provided that the cargo should be discharged by the steamer at port of destination, in the usual manner, with customary steamer despatch, according to the custom of the port, "but if, through any fault of the merchant or charterer, the steamer is longer detained, demurrage to be paid at the rate of twenty-five pounds per day," and "Any dispute or claim arising out of any of the conditions of this charter party shall be adjusted at port where it occurs, and same shall be settled by arbitration."

The shipowner commenced an action in a county court against the holder for value of the bill of lading for demurrage alleged to have been incurred at the port of discharge. The county court judge stayed all proceedings in the action on the ground that the arbitration clause in the charter party was incorporated in the bill of lading, and a Divisional Court, [1910] P. 293, affirmed the order :—

Held by the Court of Appeal, that the order staying proceedings must be discharged, as the arbitration clause in the charter party did not apply to the dispute between the shipowner and the holder of the bill of lading.

Hamilton v. *Mackie* (1889) 5 Times L. R. 677, followed. THE "PORTSMOUTH" - **C.A. 54**

SHIPPING—*continued.*

2. —— *Charterparty—Demurrage — Custom of Port — Discharge by Harbour Authority—Delay not attributable to Charterer.*

By charterparty it was provided that a cargo of pit props should be discharged with the customary steamship despatch as fast as the steamer could deliver during the ordinary working hours of the port, but according to the custom thereof, and should the steamer be detained beyond the time stipulated as above, demurrage should be paid at 4*d.* per net registered ton per day, and pro rata for any part thereof. The discharge was to be effected by the receiver's stevedore, the steamer paying so much per fathom ; but, by the custom of the port, the harbour authority discharged the cargo, and some delay occurred. In an action for demurrage brought by the shipowner against the charterer :—

Held, that the charterer was not liable for delay due to circumstances beyond his control, that is to say, he was not responsible for the acts of an authority who was not his servant or agent, or was no more his agent than that of the shipowner.

The dicta in *Weir* v. *Richardson* (1897) 3 Com. Cas. 20, followed. THE "KINGSLAND"
Div. Ct. 17

3. —— *Collision—Barry Dock Entrance—Crossing Rule—Application of Rule—Regulations for Preventing Collisions at Sea*, 1897, *arts.* 21, 23, 27.

By art. 21 of the regulations for preventing collisions at sea, "Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed . . . ." By art. 23, "Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse." By art. 27, "In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

The plaintiffs' steamship, bound to Barry Roads, Bristol Channel, for orders, passed the signal station without receiving them, and, proceeding on in an easterly direction towards Barry Dock, came into collision with the defendants' steamship, passing out in a southerly direction from between the breakwaters. In the Court below the plaintiffs' vessel was found alone to blame for coming in too close, and, by reversing, obstructing the passage out of the defendants' steamship when she ought, as a crossing vessel, under art. 21, to have kept her course and speed.

The plaintiffs appealed on the ground that the defendants' vessel was also to blame for not, under art. 23, stopping or reversing sooner than she did :—

Held by the Court of Appeal (Lord Alverstone C.J. and Kennedy L.J., Buckley L.J. dissenting), that the defendants' vessel was not, in the circumstances, to blame, for, assuming the crossing rule to apply, a departure from that rule was

SHIPPING—*continued.*

justified by art. 27 in order to avoid immediate danger, as, considering the narrowness of the entrance, the shallowness of the water, the set of the tide, and the position of the breakwaters, reversing sooner than she did might have put her ashore.

Held by Buckley L.J., that the defendants' vessel was also to blame, as she should have kept out of the way, and, for that purpose, might have stopped or reversed, under art. 23, sooner than she did, there being no danger of her going ashore.

Per Lord Alverstone C.J. : *Quære* whether the regulations for preventing collisions at sea apply to the case of a vessel coming out of dock in circumstances similar to those under which the defendants' vessel was placed. THE "HAZELMERE" - - - - - **C.A. 69**

4. —— *Collision—Compass Bearing—Regulations for Preventing Collisions at Sea*, 1897, *art.* 17, *Preliminary.*

The defendants' steamship was proceeding to the eastward, near the Sandettie lightship in the North Sea, when those in charge observed, at a distance of some six miles, and about ahead, a white light which proved to be the masthead light of the plaintiffs' steamship, which was proceeding on a converging course in the opposite direction. Assuming that that light, and a second white light, belonged to a fishing boat, those in charge of the defendants' vessel disregarded them, and, in the ordinary course of navigation, starboarded the helm for the next lightship, thereby bringing about a collision with the plaintiffs' vessel, which was properly porting to keep out of the way :—

Held by Bargrave Deane J., that (apart from other contributing causes, rendering both vessels to blame) the initial cause of the collision was neglect by those in charge of the defendants' vessel to comply with the directions contained in the preliminary to art. 17 of the regulations for preventing collisions at sea, as to "carefully watching the compass bearing of an approaching vessel," for, if this had been done, it would have been ascertained that starboarding would involve risk of collision. THE "PRESIDENT LINCOLN"
Bargrave Deane J. 248

5. —— *Collision—Launch—Duty of Vessel anchored in Track of Launch—Risk of postponing Launch.*

The defendants, owners of a shipbuilding yard on the Mersey, being about to launch a vessel, gave the usual notices, and arranged with the owners of some moorings nearly opposite to pay half the cost of removing the buoy marking their position. The plaintiffs' ketch, which was coming up the river on the morning of the intended launch, finding the wind falling light, and with a view to bringing up, let her anchor drag, and, fouling the moorings, the vessel remained fast. Messages were sent by the defendants to the master of the ketch to move her, and, finally, a tug, whilst offering to tow the ketch away, delivered a letter advising her master to slip, and stating that the defendants would not be responsible for any damage to the

SHIPPING—*continued.*

ketch or for any accident to any person on board. The master of the ketch, however, thinking his vessel was out of the zone of danger, refused to slip without an undertaking from the defendants that they would be answerable for the cost of the anchor if lost. The defendants, not deeming it prudent to incur the risk of further delay, launched the vessel, which struck the ketch. In an action of damage by collision, brought by the owners of the ketch, the President found that the master of the ketch had no right to make it a condition before moving that the defendants should give an undertaking to replace the anchor, and that he was at fault for not slipping his chain and removing to a place of safety, but that the defendants were alone to blame as they had, for their own purposes, and to the plaintiffs' injury, launched the vessel without regard to the possible consequences to the plaintiffs' ketch and her crew. The plaintiffs' negligence, therefore, did not excuse the defendants, because they might, by the exercise of care, have avoided the mischief which their deliberate action caused:—

Held by the Court of Appeal (Vaughan Williams, Fletcher Moulton, and Buckley L.JJ.), reversing the decision of the President, that the plaintiffs' ketch was alone to blame, for the defendants reasonably chose that which they believed to be the lesser of two evils, and risked the slight chance of injuring the ketch in order to avoid the serious risk to life and property which would result from postponing the launch. THE "HIGHLAND LOCH" - - **C. A. 261**

6. —— *Collision*—"*Ship*"—*Limitation of Liability*—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 503, 742—*Hopper Barge.*

A hopper barge, used for dredging purposes, with a rudder but without means of propulsion, and when under way, towed to and from her destination, is a "ship" within the meaning of s. 742 of the Merchant Shipping Act, 1894, and her owners are entitled to limit their liability under s. 503 of the same Act.

The "*Mac*," (1882) 7 P. D. 126, followed. THE "MUDLARK" - - **Bargrave Deane J. 116**

7. —— *Collision—Single Ship and Squadron of Warships—Negligence—Contributory Negligence*—"*Course authorized or required by these Rules*"—*Regulations for Preventing Collisions at Sea*, 1897, *art.* 28—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 419, *sub-s.* 4—*Costs.*

In an action of damage by collision brought by the plaintiffs, the Commissioners for executing the Office of Lord High Admiral of the United Kingdom, and the officers and crew of a torpedo destroyer (suing for their lost effects), against the defendants and counter-claimants, the owners of a merchant steam vessel, it was held in the Court below (following *H.M.S. Sans Pareil* [1900] P. 267) that those responsible for the navigation of the merchant vessel got her into a wrong position with reference to the flotilla, of which the warship formed part, and in so doing were guilty of bad navigation involving negligence in law; but that those in charge of the warship could, by the exercise of ordinary

SHIPPING—*continued.*

skill and care, have avoided the collision, and, therefore, they were alone to blame. The plaintiffs appealed, contending that the defendants were alone to blame:—

Held by the Court of Appeal (Vaughan Williams, Farwell, and Kennedy L.JJ.), differing from the Court below on a question of fact, that the allegation of those in charge of the merchant vessel that they sounded the appropriate signal, when porting the helm shortly before the collision, had not been established, and, as this omission might by possibility have contributed to the collision, those in charge must be deemed, under s. 419, sub-s. 4, of the Merchant Shipping Act, 1894, to be in fault for a breach of art. 28 of the regulations for preventing collisions at sea, and that the "statutory blame," for not sounding the signal appropriate to the course, followed, although the Court found that the course taken by the merchant vessel was not a "course authorized or required by the rules" within the meaning of the article. The decree of the Court below on the claim and counter-claim was, therefore, amended by a finding that both vessels were to blame, with no costs in the Court of Appeal or in the Court below. THE "HERO" - - - - - - **C. A. 128**

8. —— *Collision—Steam Trawler* "*engaged in trawling*"—*Steamship crossing—Effect of Exhibition of Triplex Light—Giving way—Regulations for Preventing Collisions at Sea*, 1897, *arts.* 9 (1906) (*d*) 1., 19, 21.

By art. 9 (*d*) 1. of the regulations for preventing collisions at sea, the exhibition of a triplex light is rendered compulsory on a steam vessel "engaged in trawling," and an intimation is thereby given to a crossing steam vessel that, as the trawler, by being incumbered, is unable to comply with art. 19 of the same regulations, and keep out of the way, the steam vessel must give way (*The Grovehurst* [1910] P. 316), but that the trawler will, under art. 21, keep her course and speed.

Where, therefore, a steam trawler was (as the Court found) duly exhibiting the triplex light, and those in charge did not stop on seeing a crossing steam vessel causing imminent risk by suddenly porting when close to, and a collision occurred:—

Held by Bargrave Deane J., that the crossing steam vessel was alone to blame, for, in the circumstances, as a matter of seamanship, and, under the rules, as a matter of law, those in charge of the trawler were justified in keeping their course and speed. THE "RAGNHILD" **Bargrave Deane J. 254**

9. —— *Collision—Thames, River—Port of London—Compulsory Pilotage*—"*Master*"—*General Pilotage Act*, 1825 (6 *Geo.* 4, *c.* 125), *s.* 59—*Thames By-laws*, 1898, *arts.* 4, 14—*Duty of Look-out in the River Thames.*

The defendants' steam vessel, belonging to the port of London, whilst proceeding, in charge of a duly licensed Trinity House pilot, down the river Thames, bound from London to East Africa with cargo and passengers, came into collision, through the fault of the pilot alone, with some

SHIPPING —*continued.*

tugs and barges of the plaintiffs in Bugsby's Reach. In an action of damage by collision :—

Held by Sir Samuel Evans, President (following *The Hankow* (1879) 4 P. D. 197), that the defendants were not liable, as pilotage was compulsory, the port of London, within which the collision occurred, being a port in relation to which particular provision, for the appointment of pilots, has been made by charter and by Act of Parliament, within the meaning of 6 Geo. 4, c. 125, s. 59.

The master of the defendants' steam vessel was not on the bridge for four or five minutes prior to the collision :—

Held that, though by art. 14 of the Thames By-laws, 1898, the "master of every steam vessel navigating the river shall be . . . . on the bridge," the voluntary absence of the master did not amount to default for which the owners of the vessel were liable, as a competent officer was left with the compulsory pilot on the bridge, and there were no special circumstances of difficulty, or no special matters within the knowledge of the master of which he ought to have been ready to inform the pilot.

Quære, whether, under the definition of "master" in art. 4 of the same rules, the pilot, being in charge by compulsion of law, was not the "master" for the time being.

A look-out cannot report every light he sees in the river Thames ; but he must report every material light as soon as it becomes material. THE "UMSINGA" - **Samuel Evans, Pres. 234**

10. —— *Collision—Thames, River—Proper Mode of keeping a Look-out in the River Thames.*

NOTE.—The case of *The "Skakkeborg"* (referred to in the case of *The "Umsinga"* [1911] P. 234, at p. 237 (see preceding case), as to reporting lights in the Thames) arose out of a collision in the lower part of Gravesend Reach of the river Thames and was tried by Bargrave Deane J., assisted by two of the Elder Brethren of the Trinity House, on April 10 and 11, 1911. In the result the *Skakkeborg* was found alone to blame for porting to a green light and not reversing sooner ; but, in the course of his judgment (see [1911] P. at pp. 245, n., 246, 247), the learned judge dealt with the question of the proper mode of keeping a look-out in respect of reporting lights in the river Thames. THE "SKAKKEBORG" - **Bargrave Deane J. [1911] P. 245, n.**

11. —— *Collision — Upper Humber — Ship —Rounding the Bend at Whitton Gas Float No. 3—Navigation.*

Although there is no positive rule with regard to the navigation of the narrow deep-water channel in the neighbourhood of Whitton gas float No. 3 in the Upper Humber, the practice, based on good seamanship, requires that those in charge of a steamship, proceeding against the flood tide, should avoid meeting another vessel at the gas float, and should, therefore, wait until the vessel proceeding with the tide has rounded the bend. THE "EZARDIAN"

Bargrave Deane J. 92

12. —— *Oyster Beds — Ship — Navigable River—Damage to Oyster Beds—Liability of Conservancy Board for Negligent Act of Harbour-master—Non-liability of Owner of Vessel—Continuing Authority.*

The plaintiff, lessee of an oyster bed, brought an action against the conservators of the river Medway to recover the damage sustained by him owing to their harbour-master having placed, and kept for the purpose of repair, a brig which had foundered in the fairway, on the land comprised in the fishery, and the owner of the brig was added as a defendant, the plaintiff alleging that he was a party to the wrongful act of the harbour-master :—

Held, that the harbour-master had notice of the existence of the fishery, and in selecting that place, without necessity, he was guilty of negligence for which the defendant conservators were liable, as they could not ignore their lease and rely upon their powers to remove sunken vessels ; but that the defendant owner of the brig, although he had notice of the oyster bed, was not liable for the further damage occasioned by keeping the vessel there for the purpose of repair, as he acted in pursuance of the directions, and under the continuing authority, of the harbour-master, for whose further negligence the conservators were liable. THE "BIEN"

Bargrave Deane J. 40

13. —— *Salvage—Claim by Tug engaged to tow — Obligations under Towage Contract — Burden of Proof—Counter-claim for Breach of Contract of Towage—Claim by other Tugs belonging to same Owners—Claim by the Master and Crew of the Tug engaged to tow, and by the Masters and Crews of the other Tugs belonging to the same Owners.*

Tug owners contracted with the agents of the owners of a large French sailing ship to provide a tug to tow her from Falmouth to London. After passing the Prince's Channel lightship, a strong south-westerly wind was encountered, and tug and tow drifted to leeward, the tow taking the ground on the West Shingles Sand. There she remained for several days, during which time the tug engaged to tow, and three other tugs belonging to the same owners, besides other tugs, lifeboats, and a number of boatmen, came to her assistance, and on the fourth day the vessel came off.

In consolidated actions of salvage, the claims of the owners of the tug engaged to tow, and of the three other tugs belonging to them, and also those of the masters and crews of the respective tugs, were separately considered. Some were allowed, and some were disallowed. Other claims for "engaged" services in the nature of salvage were also allowed, although the services did not result in the ultimate salving of the vessel. As to the various claims :—

Held by the President (Sir Samuel Evans), that the claims of the owners, master, and crew of the tug towing under the contract must be rejected as her owners had failed to prove (the burden of proof being upon them) that they had supplied a tug efficient for the purpose, or that the change from towage to salvage became necessary by reason of special circumstances in the nature of vis major or inevitable accident,

SHIPPING—*continued.*
and not by reason of the inefficiency of the tug, or want of skill and care on the part of the master and crew.

Negligence not having been pleaded by the defendant owners of the tow, it was objected that the defendants could not rely on the want, if any, of skill and care on the part of those in charge of the tug; but:—

Held, that it is not necessary to plead negligence in order to defeat a salvage claim.

Held, further, that for any services rendered by the other three tugs belonging to the same owners, the owners were not entitled to salvage as they had failed in the performance of their contract to tow, but:—

Held, that this did not bar the claims of the masters and crews of the three last-mentioned tugs to an award for "engaged" services rendered in the salvage operations.

The defendants, the owners of the sailing ship, counterclaimed against the owners of the tug under the contract of towage for damages in respect of the stranding of the tow:—

Held, that special conditions in the contract of towage—although they could not enure to the benefit of the plaintiffs in the salvage claim—did in the circumstances afford a defence to the counter-claim for damages for breach of contract.

The obligations under a contract of towage stated; and observations on the necessity, in the public interest, of careful scrutiny of a claim for salvage by a tug which had been engaged to tow the vessel in respect of which the salvage claim is made. "THE MARÉCHAL SUCHET"
Samuel Evans, Pres. 1

14. —— *Towage Contract—Defective Towing Gear—Warranty of Fitness of Tug—Exemptions applying only after Towage began.*

Whilst the defendants' tug was towing the plaintiffs' vessel from Birkenhead to the Canada Dock, Liverpool, the towing gear of the tug carried away, with the result that the plaintiffs' vessel fell against the pierhead at the entrance to the dock and sustained damage.

In an action for breach of the contract of towage, the defendants relied on a condition in the contract by which they were "not to be responsible for any damage to the ship they have contracted to tow arising from any perils or accidents of the seas rivers or navigation collision straining or arising from towing gear (including consequence of defect therein or damage thereto) and whether the perils or things above mentioned or the loss or injury therefrom be occasioned by the negligence default or error in judgment of the pilot master officers engineers crew or other servants of the tug owners":—

Held by the Court of Appeal (Vaughan Williams, Farwell, and Kennedy L.JJ.), affirming the decision in the Court below [1911] P. 23, that the defendants were liable—whether there was a warranty of fitness implied in the contract of towage, as the President in the Court below had found, or whether the duty of the defendant tug owners was restricted to the supply of a tug as reasonably fit for service as care and skill could make it—for the cause of

SHIPPING—*continued.*
the damage sustained by the plaintiffs' vessel was the defective condition of the rivets attaching the towing gear of the tug to her bunker casing. This defect was not covered by the contract, the conditions of which only applied to circumstances occurring after the commencement of, and during, the towage, and not to the state of things existing before the towage began.

Held, further, by Farwell and Kennedy L.JJ. (Vaughan Williams L.J. dissenting), that the words "towing gear" did not include the rivets, or attachments, between the gear and the bulkhead, and, therefore, the defect which caused the accident was not within the words of the condition. THE "WEST COCK"
C. A. 208

SOLICITOR—Costs of wife—Change of solicitor—Bill of costs - - - - **120**
See DIVORCE. 9.

STATUTES:—

1825.

6 Geo. 4, c. 125, s. 59—*General Pilotage* **234**
See SHIPPING. 9.

1843.

6 & 7 Vict. c. 73, s. 37—*Solicitors* - - **120**
See DIVORCE. 9.

1857.

20 & 21 Vict. c. 77, s. 73—*Court of Probate*
See PROBATE. 3. **108**

20 & 21 Vict. c. 85, s. 27—*Matrimonial Causes* - - - - - **191**
See DIVORCE. 5.

1859.

22 & 23 Vict. c. 61, s. 5—*Matrimonial Causes*
See DIVORCE. 10. **186**

1869.

32 & 33 Vict. c. 68, s. 3—*Evidence* - - **90**
See DIVORCE. 7.

1884.

47 & 48 Vict. c. 68, s. 5—*Matrimonial Causes*
See DIVORCE. 1. **201**

1894.

57 & 58 Vict. c. 60, s. 419, sub-s. 4—*Merchant Shipping* - - - - - **128**
See SHIPPING. 7.

—— —— ss. 503, 742 - - - - **116**
See SHIPPING. 6.

1895.

58 & 59 Vict. c. 39—*Summary Jurisdiction (Married Women)* - - - **195**
See DIVORCE. 4.

See PRACTICE. **38**

STAY OF PROCEEDINGS — Divorce — Wife's costs—Non-payment by husband—Stay of proceedings on second petition - **101**
See DIVORCE. 8.

SUMMARY JURISDICTION.
See under JURISDICTION.

SUMMARY JURISDICTION (MARRIED WOMEN) ACT, 1895 - - - **38**
See PRACTICE.

—— Security for costs — Order of justices—Husband's appeal—Order for security—Stay - - - - - - **38**
See PRACTICE.

THAMES — Collision—Port of London — Compulsory pilotage—"Master"—Duty of look-out in the river Thames - **234**
See SHIPPING. 9.

—— Collision—Proper mode of keeping a look-out in the river Thames - **245, n.**
See SHIPPING. 10.

THAMES BY-LAWS, 1898, arts. 4, 14 - **234**
See SHIPPING. 9.

TOW—Ship—Claim by tug engaged to tow—Obligations under towage contract—Burden of proof - - - - - **1**
See SHIPPING. 13.

TOW—*continued.*

—— Ship—Towage contract—Defective towing gear—Warranty of fitness of tug - **208**
See SHIPPING. 14.

TRAWLER—Collision—Steam trawler "engaged in trawling" — Steamship crossing—Effect of exhibition of triplex light—Giving way - - - - - **254**
See SHIPPING. 8.

TUG—Ship—Towage contract—Defective towing gear—Warranty of fitness of tug **208**
See SHIPPING. 14.

WARSHIPS—Collision—Single ship and squadron of warships—Contributory negligence - - - - - - - **128**
See SHIPPING. 7.

WILL—Probate.
See under PROBATE

WORDS—"Master" - - - - - **234**
See SHIPPING. 9.

—— "Ship" - - - - - - - **116**
See SHIPPING. 6.

BRADBURY, AGNEW, & CO. LD., PRINTERS, LONDON AND TONBRIDGE.